93-443

No. _____

Supreme Court, U.S.
FILED
SEP 20 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JEAN A. McINTOSH, Individually and as Conservator for KRISTIN K. McINTOSH, A Protected Person,

Petitioner,

vs.

PACIFIC HOLDING COMPANY and THE PACIFIC HOLDING COMPANY EMPLOYEE WELFARE BENEFIT PLAN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:

TIMOTHY R. ENGLER
GREGORY D. BARTON
HARDING & OGBORN
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

Counsel of Record for Petitioner Jean A. McIntosh

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals erred in determining that the Pacific Holding Company Employee Welfare Benefit Plan (the Plan), which is regulated by the provisions of the Employee Retirement Income Security Act (ERISA) of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.*, could force Jean McIntosh, as Conservator for Kristin McIntosh, to reimburse the Plan for *medical expense* benefits provided to Kristin from funds paid in settlement *solely* as compensation for Kristin's *personal injuries* even though Kristin did not, as a matter of law, have a claim for recovery of medical expenses from potentially liable third parties.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

REPORT OF OPINION 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 9

1. AN ERISA-REGULATED EMPLOYEE BENEFIT PLAN SHOULD NOT BE ALLOWED TO FORCE A PLAN BENEFICIARY TO "REIMBURSE" THE PLAN FOR MEDICAL BENEFITS PROVIDED BY THE PLAN OUT OF COMPENSATION RECEIVED BY THE BENEFICIARY WHICH IS LEGALLY UNRELATED TO THE BENEFITS RECEIVED BY THE BENEFICIARY 9

   (a) An Important Federal Question Exists, Unresolved by this Court, Concerning The Limits on the ERISA Plan's Ability to Impose Inequitable Conditions Upon a Beneficiary For Reimbursement And/Or Subrogation 9

   (b) A Conflict Exists Among the Circuits on the Issue of Whether an ERISA-Regulated Employee Benefit Plan Seeking Reimbursement Must Prove that the Amount Sought for Reimbursement was Included in the Third-party Settlement Obtained by the Beneficiary 16

TABLE OF CONTENTS – Continued

Page

2. THE ONLY REASONABLE CONSTRUCTION OF THE PLAN'S "REIMBURSEMENT" PROVISION IS THAT THE PLAN IS ENTITLED TO REIMBURSEMENT ONLY WHERE THE AMOUNT SOUGHT FOR REIMBURSEMENT WAS INCLUDED IN THE SETTLEMENT OBTAINED BY THE BENEFICIARY 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Automobile Ins. Co. of Hartford v. Conlon, 216 A.2d 828 (Conn. 1966) 17

Continental Ins. Co. v. Connecticut Natural Gas Corp., 497 A.2d 54 (Conn. App. Ct. 1985) 17

Cutting v. Jerome Foods, Inc., 993 F.2d 1293 (7th Cir. 1993) 11, 21, 22

Evans v. Midland Enterprises, Inc., 754 F. Supp. 91 (M.D. La. 1990) 15

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 10

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 10, 11, 12

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 11

Franchise Tax Bd. v. Const. Laborers Vac. Trust, 463 U.S. 1 (1983) 10

Jones v. SONAT, Inc. Master Emp. Ben. Plan Admin. Comm., 997 F.2d 1130 (5th Cir. 1993) 11, 20, 21

Liberty Corp. v. NCNB Nat. Bank of South Carolina, 984 F.2d 1383 (4th Cir. 1993) 11, 14, 17, 19, 20

Macku v. Drackett Products Co., 343 N.W.2d 58 (Neb. 1984) 19, 20

McIntosh v. Pacific Holding Company, et al., 992 F.2d 882 (8th Cir. 1993) 1, 10, 17, 25

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 10

Rebaldo v. Cuomo, 749 F.2d 1333 (2d Cir. 1984) 16

TABLE OF AUTHORITIES – Continued

Page

Sargeant v. International Union of Operating Engineers, Local Union 478 Health Benefits & Ins. Fund, 746 F. Supp. 241 (D. Conn. 1990) 15, 17

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)...11, 14

Shelter Ins. Co. v. Frohlich, 498 N.W.2d 74 (Neb. 1993) 15

Smith v. Manville Forest Products Corp., 521 So. 2d 772 (La. App. 2 Cir. 1988) 23

Transport Indemnity Co. v. Garcia, 552 P.2d 473 (N.M. Ct. App. 1976) 23

Wallace v. Aetna Life & Cas. Ins. Co., 499 So.2d 577 (La. App. 2 Cir. 1986) 24

Westendorf v. Stasson, 330 N.W.2d 699 (Minn. 1983) 24

STATUTES AND REGULATIONS

28 U.S.C. § 1254 1

28 U.S.C. § 1331 1

ERISA, 29 U.S.C. §§ 1001 *et seq* ..... *passim*

29 U.S.C. § 1132 1

29 U.S.C. § 1144 12

OTHER

BLACK'S LAW DICTIONARY 1157 (5th ed. 1979)..... 23

REPORT OF OPINION

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *McIntosh v. Pacific Holding Company, et al.*, 992 F.2d 882 (8th Cir. 1993).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 17, 1993. (App. 1; 992 F.2d at 882.) McIntosh's Petition for Rehearing was denied on June 24, 1993. (App. 10.) The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254, 28 U.S.C. § 1331, and ERISA, 29 U.S.C. §§ 1001 *et seq.*

STATUTES INVOLVED

Federal subject matter jurisdiction in this case exists under ERISA, 29 U.S.C. §§ 1001, *et seq.*, and specifically pursuant to 29 U.S.C. § 1132, which provides, in relevant part:

> A civil action may be brought
>
> (1) by a participant or beneficiary –
>
> . . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

This case involves an issue of first impression – whether there are any limits on an ERISA-regulated employee benefit plan's ability to require a plan beneficiary to "reimburse" a plan for payments of medical benefits from settlement funds from a third-party tortfeasor where the settlement did not involve any recovery for medical expenses. The material facts of the case are undisputed, and the issue was presented to the trial court based on stipulated facts. (App. 13, 32-37.)

On July 31, 1988, Kristin McIntosh, a normal, healthy teenager, was a passenger in a vehicle which was struck by a drunk driver. Kristin's injuries included catastrophic physical and mental disabilities. (App. 33.) Extensive medical care was required for Kristin. In excess of Four Hundred Thirty Four Thousand Two Hundred Dollars ($434,200.00) was incurred for the hospital and medical care of Kristin. (App. 33-34.)

At the time of the accident, Jean McIntosh was employed by the Cornhusker Hotel in Lincoln, Nebraska, which was owned by David Murdock doing business as Pacific Holding Company. Ms. McIntosh's employment provided her with dependent medical coverage pursuant to a self-funded ERISA plan (the "Plan"). Jean McIntosh filed claims with the Plan for the medical expenses incurred for the treatment of Kristin's personal injuries. On December 30, 1988, Pacific, on behalf of the Plan, informed Jean McIntosh that the Plan would refuse to continue to make benefit payments on any claims submitted for Kristin's medical treatment unless and until Jean

McIntosh executed a "subrogation" letter. Pacific also demanded that Jean McIntosh execute a document entitled "Acknowledgment and Agreement" as a pre-condition to the Plan's payment of Kristin's medical expenses. (App. 34-35.)

Jean protested signing the "subrogation" documents. Before signing either of these documents, Jean McIntosh sought and received assurances from Pacific that her execution of the "subrogation" letter and the document entitled "Acknowledgment and Agreement" would in no way alter Kristin's rights under the Plan, and that her execution of these documents would not enlarge the Plan's subrogation/reimbursement rights as set forth in the Plan's provision entitled "Subrogation." Pacific agreed that Jean McIntosh's execution of the documents did not constitute a waiver or relinquishment of either Jean McIntosh's rights or those of Kristin to seek a judicial determination of the scope of the Plan's asserted rights to subrogation or reimbursement, or lack thereof. (App. 35-36.)

The Plan's subrogation provision provided:

SUBROGATION

> It is hereby agreed that in the event a Covered Person receives *any benefits* arising out of injury or illness for which the Covered Person has, may have, or asserts any claim or rights to recovery against a third party or parties, then any payment or payments by the Plan *for such benefits* shall be made on the condition and with the agreement and understanding that the Plan

> will be reimbursed therefor by the Covered Person to the extent of, but not exceeding the amount or amounts received by the Covered Person from such third party or parties by way of settlement or in such satisfaction of any judgment or judgments. The Covered Person shall do nothing to prejudice the rights of the Plan to such reimbursement and when requested by the Plan, the Covered Person shall execute and deliver any and all instruments and papers required by the Plan in order to assure the Plan's rights of such reimbursement.
>
> The Plan shall be subrogated to all claims, demands, actions and rights of recovery of the Covered Person against a third party or parties, or such third party or third parties' insurers to the extent of any and all payments made hereunder by the Plan *in all jurisdictions where subrogation is lawfully permitted.* The Covered Person hereby agrees that he shall execute and deliver any and all instruments and papers required by the Plan in order to protect the Plan's rights to subrogate as granted hereunder and, further, the Covered Person shall do whatever is requested or necessary in order to fully execute and to fully protect all of the Plan's rights hereunder. The Covered Person shall do nothing to prejudice the rights of the Plan to such subrogation.

(App. 38) (emphasis added).

Jean McIntosh, both individually and as the duly-appointed Court Conservator for Kristin McIntosh, proceeded with a lawsuit against Leonard Hawkins, the negligent driver of the other vehicle involved in the accident.

(App. 36.) Hawkins had a policy of automobile liability insurance which provided coverage for up to $100,000. (App. 34.) The owner of the vehicle in which Kristin was a passenger also had an automobile liability policy of insurance which provided underinsurance protection of an additional $150,500 in coverage. (App. 34.) Because Kristin's injuries were so severe, both insurance companies were willing to pay the full limits of their policies in settlement of the claims. However, before the insurance companies were willing to pay the proceeds of the insurance, the companies demanded full releases from both Jean McIntosh and Kristin McIntosh for any claims either had as a result of the accident. The releases were critical to the insurance companies, because without a release, the insurance companies were concerned that they may have had a continuing duty to defend Hawkins in the lawsuit, even though they had paid the policy limits. Both McIntosh and the Plan agreed to settle and provide the releases because, other than the insurance, Hawkins was judgment-proof. (App. 36, 39-47.)

On April 10, 1990, Jean McIntosh, individually and as Conservator of Kristin McIntosh, entered into a settlement agreement with Hawkins and both insurance companies with the knowledge, participation and consent of Pacific. (App. 36, 39-47.) The purpose of the Settlement Agreement was to settle both claims made by Jean McIntosh, one on behalf of herself for Kristin's medical expenses, and the other on behalf of Kristin for her general damages, not including any medical expenses. (App. 36, 39-40.)

The relevant terms of the Settlement Agreement were:

(B) The parties agree that Conservator and Pacific shall accept payment of One Hundred Thousand Dollars ($100,000.00) from Hawkins and State Farm *for damages claimed to have been suffered by Conservator* as a result of the automobile accident which occurred on July 31, 1988 at the intersection of 11th and D Streets in Lincoln, Lancaster County, Nebraska. Payment of said sum shall be made at the time of the execution of this Settlement Agreement, and the settlement draft shall be made payable to Conservator and Pacific.

(C) The parties agree that Conservator and Pacific shall accept payment of One Hundred Fifty Thousand Five Hundred Dollars ($150,500.00) from Stephens and Allied *for damages claimed to have been suffered by Conservator* as a result of the automobile accident which occurred on July 31, 1988 at the intersection of 11th and D Streets in Lincoln, Lancaster County, Nebraska. Payment of said sum shall be made at the time of the execution of this Settlement Agreement, and the settlement draft shall be made payable to Conservator and Pacific.

(App. 41) (emphasis added).

Pursuant to the terms of the Settlement Agreement, the proceeds of both insurance policies ($250,500.00) were paid to the Conservator and Pacific, jointly, and placed in an escrow account pending resolution of the litigation to determine the respective rights to the escrowed funds. (App. 37, 43, 48-55.)

Course of Proceedings in ~~the~~ District Court

On cross-motions for summary judgment, the District Court granted summary judgment to McIntosh and awarded her attorney's fees. (App. 3, 13-28, 30-31.) The District Court ruled the evidence established that, as a matter of law, the Plan was not entitled to subrogation or reimbursement. The District Court applied a *de novo* standard of review, reasoning that the determination of whether Nebraska law permitted subrogation was a question of law and not a discretionary function, because of the precise language of the Plan. (App. 20-21.) The District Court concluded that ERISA did not preempt Nebraska law of subrogation because the terms of the Plan's subrogration provision specifically incorporated Nebraska law regarding subrogation. (App. 14-20.) The District Court found there was no evidence of an intent by Congress to preclude an ERISA plan from subjecting itself to nonuniformity by including terms dependent on state law. Therefore, the District Court found it was consistent with Congressional intent for a plan to make itself compatible with state law, and thereby provide additional benefits to employees in states where subrogation was not permitted. (App. 19-20.)

In resolving the case fully in favor of McIntosh, Senior District Court Judge Warren K. Urbom found: "By the plain terms of the settlement agreement, Jean McIntosh did not recover for her losses, including the medical expenses incurred for Kristin's care. Rather, the entire recovery was allocated to Kristin for her personal injuries." (App. 23.) Judge Urbom further concluded: "The

settlement which the Plan participated in and agreed to provided no recovery to Jean McIntosh in [her parental] capacity but allocated the entire proceeds as recovery for injuries incurred by the conservator for Kristin's personal injuries. Thus, *the settlement provided absolutely no recovery for Kristin's medical expenses." Id.* (emphasis added). The District Court concluded that, since there was no recovery for medical expenses and the Plan's subrogation clause authorized subrogation only from funds recovered for medical expenses paid by the Plan, the Plan was not entitled to subrogation. (App. 23-24.)

The District Court's conclusions on the subrogation issue encompassed the Plan's claim that it also had a right to reimbursement. (App. 13) (recognizing McIntosh's action was one "seeking a declaratory judgment that the defendants have no right to reimbursement or subrogation"). Inherent in the District Court's decision was its conclusion that there was no legal distinction between a claim for reimbursement or a claim for subrogation under these circumstances.

Course of Proceedings on Appeal

On appeal, the Eighth Circuit reversed the Judgment of the District Court. The narrow issue the Eighth Circuit chose to address was how to interpret the first sentence of the first paragraph of the "Subrogation" section of the Plan. (App. 6; 992 F.2d at 884.) In its decision, the Eighth Circuit used a hypertechnical construction of the "reimbursement" paragraph of the "Subrogation" section of the Plan which neither party had addressed. The Eighth

Circuit concluded that the Plan, which paid benefits only for *medical expenses* (for which Kristin as a matter of law had no claim or right to recovery from any third party), had a "reimbursable" interest in the settlement proceeds received as a result of the accident, which were paid *solely* as compensation for Kristin's *personal injuries*. (App. 8-9; 992 F.2d at 885.) McIntosh filed a Petition for Rehearing on May 28, 1993, which the Eighth Circuit denied by Order entered on June 24, 1993. (App. 10.)

ARGUMENT

1. AN ERISA-REGULATED EMPLOYEE BENEFIT PLAN SHOULD NOT BE ALLOWED TO FORCE A PLAN BENEFICIARY TO "REIMBURSE" THE PLAN FOR MEDICAL BENEFITS PROVIDED BY THE PLAN OUT OF COMPENSATION RECEIVED BY THE BENEFICIARY WHICH IS LEGALLY UNRELATED TO THE BENEFITS RECEIVED BY THE BENEFICIARY.

(a) An Important Federal Question Exists, Unresolved by this Court, Concerning The Limits on an ERISA Plan's Ability to Impose Inequitable Conditions Upon a Beneficiary For Reimbursement And/Or Subrogation.

By forcing an ERISA plan beneficiary to reimburse a plan out of money recovered by a beneficiary in a settlement agreement which did not include any recovery of the benefits paid by the Plan, the Eighth Circuit enforced a construction of a plan's reimbursement provision without examining whether the plan's provision, as construed, was consistent with public policy, the purposes

and common law of ERISA, and the reasonable expectations of plan beneficiaries. The *McIntosh* decision gives any ERISA plan creator virtual free reign to include *any* requirements, no matter how onerous, in its reimbursement and subrogation provisions. This decision could have a potentially devastating impact on beneficiaries of ERISA plans. This Court should grant certiorari to address the exceptionally important issue of whether there are any federal substantive common law limits on the requirements or obligations an ERISA plan creator may impose upon plan beneficiaries in the reimbursement or subrogation provisions of an ERISA plan.

This Court has previously recognized that "ERISA's legislative history indicates that, in light of the Act's virtually unique pre-emption provision, . . . 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare . . . plans.' " *Franchise Tax Bd. v. Const. Laborers Vac. Trust*, 463 U.S. 1, 24, n. 26 (1983), *quoting*, 120 CONG. REC. 29942 (1974) (remarks of Sen. Javits). *See also, Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989) (same effect); and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (recognizing that this Court's prior decisions had "held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans' ").

In *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), this Court held that a Pennsylvania anti-subrogation law was preempted by ERISA because the Pennsylvania statute "related to" an ERISA plan. However, the Court only upheld an ERISA plan's right to subrogation in the face of

contrary state law enacted by the Pennsylvania legislature. This Court did not consider the extent to which an ERISA plan can, consistent with the federal common law of ERISA, require subrogation or reimbursement from a plan beneficiary as a condition of receiving benefits. In the wake of this decision, the Circuit Courts have not been consistent in their review of a plan's subrogation or reimbursement provisions as construed by a plan administrator. As will be discussed in more detail below, the decisions of the Fourth, Fifth, and Seventh Circuits, in addition to the Eighth Circuit decision in this case, have led to inconsistent and conflicting results in ERISA cases involving a plan's claims for reimbursement, subrogation and/or set-off. *See, Liberty Corp. v. NCNB Nat. Bank of South Carolina*, 984 F.2d 1383 (4th Cir. 1993); *Jones v. SONAT, Inc. Master Emp. Ben. Plan Admin. Com.*, 997 F.2d 1130 (5th Cir. 1993); and *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3150 (U.S. Aug. 18, 1993) (No. 93-268).

As this Court recognized in *FMC Corp.*, the underlying rationale for broadly construing and applying ERISA's pre-emption provision is to prevent a "patchwork scheme of regulation [which] would introduce considerable inefficiencies in benefit plan operation." *FMC Corp.*, 498 U.S. at 60, *quoting Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). Thus, the Court has "applied the preemption clause [of ERISA] to ensure that benefit plans will be governed by only a single set of regulations." *FMC Corp.*, 498 U.S. at 60. *See also, Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) (purpose of preempting state laws that "relate to" an ERISA plan is to ensure that employers will not face " 'conflicting or inconsistent

State and local regulation of employee benefit plans' ") (quoting remarks of Sen. Williams).

The conflicts which have developed among the Fourth, Fifth, Seventh and Eighth Circuits in their case law development of the federal common law of ERISA, in cases involving claims for reimbursement, subrogation and/or set-off, have created the very "patch-work scheme of regulation," *see FMC Corp.*, 498 U.S. at 60, governing the rights and obligations of ERISA plans and their beneficiaries which the ERISA preemption provision, 29 U.S.C. § 1144, was designed to prevent. Thus, certiorari should be granted in this case to resolve the conflicts between the Fourth, Fifth, Seventh and Eighth Circuits "to ensure that benefit plans [and beneficiaries] will be governed by only a single set of" substantive rules of the federal common law of ERISA. *See FMC Corp.*, 498 U.S. at 60.

The need to resolve this conflict among the Circuit Courts and develop a uniform, equitable common law of ERISA in cases involving claims by an ERISA plan for reimbursement, subrogation and/or set-off is graphically demonstrated by the result reached by the Eighth Circuit in this case. The Eighth Circuit failed to recognize that, even though a plan provision may be construed a certain way, this does not mean such a construction should be blindly enforced if such enforcement is contrary to the law or to overriding public policy. Following the Eighth Circuit's logic, if an ERISA plan term provided that, as a condition for receiving benefit payments, a plan beneficiary was required to surrender his or her first born child to the plan, that type of provision would be enforceable. Obviously, no court would enforce such a provision, even

if such a condition was required by a plain meaning construction of the plan provision. While such an example is clearly far-fetched, it underscores the problem with construing an ERISA plan document in a vacuum, without considering such construction's ramifications.

If a plan creator is given unbridled discretion to create an unconscionable medical expense "reimbursement" provision, as the Eighth Circuit's decision encourages, there will be nothing to prevent an ERISA plan from adopting language in its plan reimbursement provision that would require reimbursement for medical expenses paid by a plan from any settlement proceeds recovered by a beneficiary, including a beneficiary's privately owned disability income insurance policy.[1] Further, a plan creator could draft a plan "reimbursement" provision which could require a beneficiary to reimburse a plan for medical expenses from proceeds received from a state workers' compensation benefits or social security benefits, even to the extent of the amounts received by the beneficiary which are expressly designed to compensate an injured person for lost wages or lost income. These are but a few examples of the type of inequitable results which can and will develop.

---

[1] The Eighth Circuit was only able to distinguish the example of a privately owned disability income insurance by construing the plan's use of the word "settlement." This distinction misses the point because disability insurance proceeds may be subject to a plan's claim for "reimbursement" for medical expense benefits if a plan's language were changed to require such a result. (App. 8-9; 992 F.2d at 885.)

Certiorari should be granted in order for this Court to address the unresolved issue of the extent to which axiomatic, substantive common law principles should be considered as ERISA common law limits on the ability of an ERISA plan creator to develop subrogation or reimbursement provisions of a plan. Specifically, the recognized principles that reimbursement claims by a plan should be governed by the same principles which govern subrogation claims, and that no right to subrogation exists until a beneficiary is "fully compensated" should be adopted as part of the federal common law of ERISA.

The adoption of these fair and just principles of common law to govern plan subrogation and reimbursement provisions as part of the federal common law of ERISA would further the fundamental public policy purpose of ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983). The Eighth Circuit's decision is contrary to this fundamental purpose of ERISA because, in the private insurance context, an insured receives two distinct common law protections which the Eighth Circuit decision has taken away from Kristin McIntosh and all other beneficiaries under an ERISA plan.

First, the Eighth Circuit's construction of the "reimbursement" provision deprives a plan beneficiary of the protection of the generally applicable rule of law that an insurer or a benefit plan has no entitlement to reimbursement for benefit payments unless the insurer or the plan proves that the amount sought for reimbursement was part of the settlement funds obtained by the beneficiary. *See, e.g., Liberty Corp. v. NCNB Nat. Bank of South Carolina,*

984 F.2d 1383 (4th Cir. 1993); and *Sargeant v. International Union of Operating Engineers, Local Union 478 Health Benefits & Ins. Fund*, 746 F. Supp. 241 (D. Conn. 1990). Second, the Eighth Circuit's decision that a plan is entitled to the entire settlement *res* (even though the plan did nothing to assist in the creation of that *res*), when it is undisputed that Kristin did not obtain a "full recovery" for her personal injuries, deprives a beneficiary of the protection of the common law rule that an insurer normally has no right to reimbursement or subrogation unless and until the insured first receives "full recovery" for his or her injuries. *See, e.g., Shelter Ins. Co. v. Frohlich*, 498 N.W.2d 741 (Neb. 1993) (seminal Nebraska case adopting the general rule of the majority of jurisdictions that "[s]ubrogation is to be allowed only when the insured is compensated in full by recovery from the tort feasor" – the insured is made whole) (collecting cases); and *Evans v. Midland Enterprises, Inc.*, 754 F. Supp. 91 (M.D. La. 1990) (holding the rule of partial subrogation applied to a reimbursement agreement of a group health benefits plan and, thus, the plan could only enforce its alleged reimbursement right if the plan succeeded in proving that the plaintiff received full compensation for his injuries from liable third parties).

The Eighth Circuit's decision in this case has clearly resulted in an injustice for Kristin McIntosh by allowing the Plan to obtain reimbursement against Kristin's entire settlement "when [Kristin] has not been fully compensated." *See Frohlich*, 498 N.W.2d at 82. Kristin's entire settlement will be applied to the Plan's medical expense reimbursement claim "with nothing left to compensate [Kristin] for [her] personal injuries." *Id.*

ERISA was never intended to allow for such an egregious result. There are no provisions of ERISA which would be even remotely offended by this Court's adoption of a common law rule of ERISA that reimbursement or subrogation provisions in an employee benefit plan are subject to the generally applicable common law rules of subrogation. Otherwise, an ERISA plan "will be permitted a charmed existence that never was contemplated by Congress." *Rebaldo v. Cuomo*, 749 F.2d 133, 139 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

(b) A Conflict Exists Among the Circuits on the Issue of Whether an ERISA-Regulated Employee Benefit Plan Seeking Reimbursement Must Prove that the Amount Sought for Reimbursement was Included in the Third-Party Settlement Obtained by the Beneficiary.

Certiorari should be granted because a conflict exists between the Fourth, Fifth, Seventh and Eighth Circuits on the issue of whether an ERISA plan seeking reimbursement, subrogation or a set-off must prove that the amounts sought for reimbursement, subrogation or set-off were included in the settlement funds obtained by the beneficiary. The issue in each of these cases is whether an ERISA plan has a right to subrogation, reimbursement or set-off where the benefits provided by the plan are not the same type of benefits received by the beneficiaries from a third-party source, or the plan beneficiary did not receive full recovery, including recovery of the same benefits received from the plan.

In this case, the Eighth Circuit held that a plan could claim a reimbursable interest in *any amount recovered* by a

beneficiary in a settlement agreement, regardless of the source from which reimbursement was sought. (App. 6; 992 F.2d at 884.) The Eighth Circuit construed the Plan's "reimbursement" provision as granting the Plan a reimbursable interest to recover *medical expense* benefits from settlement proceeds which were undeniably paid exclusively as compensation for Kristin's *personal injuries*. The Eighth Circuit's decision is contrary to the well established rule of law that the "party seeking reimbursement must prove that the amount sought for reimbursement was included in the settlement obtained by the beneficiary." *Sargeant v. International Union of Operating Engineers Local Union 478 Health Benefits & Ins. Fund*, 746 F.Supp. 241, 246 (D. Conn. 1990) (applying Connecticut law of subrogation to a "reimbursement" provision of a health plan, in holding the plan was entitled to reimbursement for medical expense benefits paid because the beneficiary's settlement *included future medical expense* as an element of the settlement recovery) (emphasis added), *citing Automobile Ins. Co. of Hartford v. Conlon*, 216 A.2d 828 (Conn. 1966); and *Continental Ins. Co. v. Connecticut Natural Gas Corp.*, 497 A.2d 54 (Conn. App. Ct. 1985).

In contrast to the Eighth Circuit's *McIntosh* decision, the Fourth Circuit has held that an ERISA plan could not claim a reimbursable interest, unless the plan proves that the amount for which reimbursement is sought was included in a beneficiary's third-party settlement. *Liberty Corp. v. NCNB Nat. Bank of South Carolina*, 984 F.2d 1383 (4th Cir. 1993). In *Liberty Corp.*, an ERISA plan claimed a right to subrogation and "reimbursement" for over $90,000 in medical expense benefits from proceeds paid in settlement of a wrongful death claim. A North Carolina

wrongful death statute limited any recovery for medical expenses to $1,500.00, even though the deceased beneficiary's estate received a settlement in excess of $1.5 million dollars. The Fourth Circuit limited the plan's right to require "reimbursement" to the level of the beneficiary's right to recover medical expenses from the third party:

> Even if the [state wrongful death act's] $1,500 cap [on recoverable medical expenses] would otherwise apply, Liberty argues, ERISA preempts its application. ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" within its scope. 29 U.S.C. § 1144(a). . . . "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." . . . Despite the breadth of this preemption, however, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." . . . Like the district court, we conclude that the North Carolina Wrongful Death Act, if it affects the Plan at all, does so in "too tenuous, remote, or peripheral a manner" to warrant preemption. *The Plan only required Bristow to reimburse Liberty for medical benefits paid to him or on his behalf by a third party. . . . Bristow thus subrogated to Liberty only his right to recover from third parties compensation for his medical expenses.* The right to recover for wrongful death under section 28A-18-2 is not, however, a right that ever belonged to Bristow or to his estate. Rather, it belongs to Bristow's beneficiaries, on whose behalf NCNB pursued the claim. . . . *This right was never subrogated.* Because *Liberty never had a*

> *subrogated right under the Plan to any of the wrongful death settlement proceeds recovered on behalf of Bristow's beneficiaries,* section 28A-18-2's cap on medical expenses does not "relate to" the Plan within the meaning of ERISA and thus is not preempted by that Act.

Liberty Corp., 984 F.2d at 1388 (emphasis added) (most citations omitted).

Even the dissenting judge in *Liberty Corp.* recognized that an ERISA plan had no subrogable or reimbursable interest in any part of the settlement that was recovered by the deceased employee's beneficiaries "for their personal losses." *Liberty Corp.*, 984 F.2d at 1391 (Hall, Circuit Judge, dissenting). Judge Hall recognized in his dissent that a plan would only be "entitled to be repaid from the part of the settlement that was provided solely as compensation for [the employee's] medical costs." *Id.*

The facts relevant to the "reimbursement/subrogation" issue in *Liberty Corp.* are indistinguishable from the facts relevant to the "reimbursement/subrogation" issue in this case. Here, the Plan claimed a right to "reimbursement" for medical expense benefits from settlement proceeds paid *solely* in settlement of a minor's (Kristin's) personal injury case, in which that minor, as a matter of law, had no right to recover medical expenses. *See Macku v. Drackett Products Co.*, 343 N.W.2d 58 (Neb. 1984) (when a minor child is injured by the act of another, two causes of action arise – one in favor of the minor for personal injuries and the other in favor of the parents for the medical expenses incurred on the child's behalf).

As in *Liberty Corp.*, the Plan document "only required [Kristin] to reimburse the [Plan] for medical benefits paid

to [her] or on [her] behalf by a third party." *Liberty Corp.*, 984 F.2d at 1388. "The right to recover for [medical expenses] under" Nebraska law "is not, however, a right that ever belonged to" Kristin because of her legal status as a minor at the time she sustained her permanent personal injuries. *Id.* Rather, the claim for Kristin's medical expenses belonged exclusively to Jean McIntosh, Kristin's mother. *See Macku*, 343 N.W.2d at 60. Although this claim was released in the Settlement Agreement, none of the settlement proceeds were allocated to Jean's individual claim for medical expenses *with the express agreement of the Plan.* (App. 23-25, 36, 40-56.) Accordingly, the Plan never had any reimbursable interest under the Plan's "reimbursement" provision to any of the settlement proceeds recovered exclusively as payment for Kristin's personal injuries.

The Eighth Circuit's interpretation of the "reimbursement" provision of the Plan is also contrary to the Fifth Circuit's decision in *Jones v. SONAT, Inc. Master Emp. Ben. Plan Admin. Comm.*, 997 F.2d 113 (5th Cir. 1993). In *Jones*, the Fifth Circuit ruled an ERISA plan administrator abused its discretion when it decided to set-off proceeds received in settlement of a personal injury claim under the Jones Act from benefits otherwise allowed because the plan administrator's decision was legally incorrect, in light of the nature of the proceeds received in the settlement.

The $260,000 settlement in *Jones* specifically excluded any claims arising out of the beneficiary's employee benefits plans, and specifically included a $30,000 amount for settlement of a claim of the beneficiary's wife for loss of consortium. Nevertheless, the plan administrator determined that the full amount of this settlement should be

set-off against monthly disability payments the beneficiary was entitled to under the terms of the plan. Under these circumstances, the Fifth Circuit affirmed the district court's determination that the plan was not entitled to any set-off because the plan administrator "unfairly characterized Jones's [the beneficary's] settlement as a worker's compensation settlement, or one 'pursuant to . . . any other legislation of similar purpose,' which would be covered by" the plan's set-off provision. *Id.* at 115. The administrator's characterization of the settlements was "unfair" because: (1) the employee had sued his employer under the Jones Act "and the settlement was reached in that action"; and (2) the settlement included $30,000 for the loss of consortium claim of the beneficiary's wife "which could only arise under the Jones Act." *See Jones*, 997 F.2d at 115. In other words, the plan administrator's set-off determination was "legally incorrect" because the amounts paid in settlement of the Jones Act claim were not shown by the plan to have been paid to compensate the beneficiary for the same type of loss for which the plan was obligated to pay benefits. *Id.*

Finally, the Seventh Circuit has recently ruled that the question of whether an ERISA plan is entitled to reimbursement or subrogation is only subject to a plan administrator's interpretation of the plan provisions, and as long as the plan administrator is not unreasonable (even if legally incorrect), said interpretation will be allowed. *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993). In *Cutting*, the beneficiaries of a self-funded ERISA plan urged the court to adopt a federal common law rule to the effect that rights of subrogation are

enforceable only after the plan beneficiary has been made whole for the losses giving rise to the claim for benefits. The Seventh Circuit rejected the plan beneficiaries' request, reasoning that the rule of subrogation advanced by the beneficiary was a rule of interpretation of the plan. The *Cutting* court specifically did not exercise its undisputed power to impose substantive common law principles on ERISA plans. In essence, the Seventh Circuit followed the same approach as the Eighth Circuit. Both courts mechanically interpreted and applied the ERISA plan provisions to reach inequitable results, without considering whether those plan provisions violated public policy or were consistent with the federal common law of ERISA.

A sharp conflict clearly exists among the Circuit Courts concerning the issue of whether an ERISA-regulated plan seeking reimbursement from a beneficiary must prove that the amount for which subrogation, reimbursement or set-off is sought was included in a third-party settlement obtained by the beneficiary. This issue is an important question of federal law which has not been, but should be, settled by this Court. Accordingly, McIntosh's Petition for Writ of Certiorari should be granted.

2. THE ONLY REASONABLE CONSTRUCTION OF THE PLAN'S "REIMBURSEMENT" PROVISION IS THAT THE PIAN IS ENTITLED TO REIMBURSEMENT ONLY WHERE THE AMOUNT SOUGHT FOR REIMBURSEMENT WAS INCLUDED IN THE SETTLEMENT OBTAINED BY THE BENEFICIARY.

The term "reimburse" means "to pay back, to make restoration, to repay that expended; *to indemnify,* or

make whole." BLACK'S LAW DICTIONARY 1157 (5th ed. 1979) (emphasis added). As it is commonly understood, the word "reimbursement" means paying an individual back for something received. *See Transport Indemnity Co. v. Garcia*, 552 P.2d 473 (N.M. Ct. App. 1976) (court defined the term "reimbursement" to mean "to make repayment to *for expense or loss incurred*") (emphasis added). It is not within the common understanding of the term "reimbursement" to encompass the concept of paying someone back for something you did *not* receive.

In this case, the District Court carefully analyzed the subrogation issue, and in doing so did not make separate reference to the Plan's reimbursement right because the District Court implicitly found that the Plan's reimbursement right was no greater than its subrogation right. Clearly, the District Court concluded that "reimbursement" and "subrogation" provisions were subject to the same principles, and therefore, there was no reason to separately consider the "reimbursement" provision.

The Eighth Circuit erred in making a distinction between the concepts of "subrogation" and "reimbursement" because courts have generally recognized that these concepts are essentially identical, with the only distinction being that a reimbursement provision is included in order to protect the plan in instances where the plan is not able to "stand in the shoes" of the injured party and bring an action itself. *Smith v. Manville Forest Products Corp.*, 521 So. 2d 772 (La. App. 2 Cir. 1988) (reasoning that "[i]n practical effect a reimbursement agreement operates in almost all respects like a subrogation agreement," to conclude that the "policy that subrogation should not injure the subrogor is equally

applicable to reimbursement"); and *Westendorf v. Stasson*, 330 N.W.2d 699 (Minn. 1983) (although health insurer drafted its clause in terms of "reimbursement" rather than "subrogation", this only meant that the insurer could not "stand in the shoes" of its members, but "in all other respects this clause serve[d] as a subrogation clause and, therefore, [the court] appl[ied] the same principles which govern subrogation").

The Eighth Circuit's decision to interpret the "reimbursement" provision of the Plan in disregard of common law principles of subrogation is not supported by the public policy purpose of such a provision. The purpose behind enforcing subrogation and reimbursement provisions is to prevent one party from receiving a "windfall" by collecting both benefits from the plan and compensation from a settlement agreement for *exactly* the same injuries. *See Wallace v. Aetna Life & Cas. Ins. Co.*, 499 So.2d 577 (La. App. 2 Cir. 1986) ("[t]he purpose of such a [reimbursement] clause is to prevent an injured party from multiple recovery *for the same injury*") (emphasis added).

Kristin McIntosh did not receive a "windfall." She has been rendered permanently paraplegic by a drunk driver. The $250,500.00 amount received in the settlement did not even remotely come close to fully compensating Kristin for the full extent of her permanent physical and mental injuries. Indeed, the settlement funds represent only a small partial compensation for Kristin's devastating injuries.

As a result of the Eighth Circuit's decision, Kristin has been deprived of any recovery for her personal injuries. No policy justification exists for the Eighth Circuit's

inequitable decision to allow the Plan to be reimbursed before Kristin was fully compensated for her injuries. This is especially true where, as here, Kristin's settlement did not, and could not as a matter of law, include any recovery for medical expenses for which the Plan was seeking reimbursement.

CONCLUSION

WHEREFORE, Petitioner Jean A. McIntosh, Individually and as Conservator for Kristin K. McIntosh, a protected person, prays that a Writ of Certiorari issue from this Honorable Court to review the Judgment of the United States Court of Appeals for the Eighth Circuit in *McIntosh v. Pacific Holding Company*, 992 F.2d 882 (8th Cir. 1993), and, following such review, that the Judgment of the Court of Appeals be reversed and the Judgment entered in favor of McIntosh by the District Court be reinstated.

Respectfully submitted,

Jean A. McIntosh, Individually and as Conservator for Kristin K. McIntosh, a Protected Person, Petitioner

BY: TIMOTHY R. ENGLER
GREGORY D. BARTON
HARDING & OGBORN
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

Counsel of Record
for Petitioner
Jean A. McIntosh

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-3621

Jean A. McIntosh, Individually and as Conservator for Plaintiff Kristin K. McIntosh, A Protected Person, Appellee, v. Pacific Holding Company and Pacific Holding Company Employee Welfare Benefit Plan, Appellants.	* * * * * * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska. [PUBLISHED]

Submitted: April 12, 1993
Filed: May 17 1993

Before WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and STOHR,* District Judge.

---

* The HONORABLE DONALD J. STOHR, United States District Judge for the Eastern District of Missouri, sitting by designation.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In July, 1988, Kristin McIntosh was very seriously injured in a car accident. At the time, Jean McIntosh, Kristin's mother, had health care insurance through her employer, the Pacific Holding Company. As Jean McIntosh's minor dependent, Kristin was also insured under that coverage. Kristin made claims through the health care plan for medical expenses related to her injuries; the health care plan has paid over $430,000 to date for those expenses.

In December, 1988, the health care plan and the employer notified Jean McIntosh that they considered it her obligation to reimburse the health care plan for some of the benefits paid if she recovered any money from third parties "by way of settlement" related to Kristin's injuries from the accident. The health care plan and the employer also stated that they considered the health care plan to be subrogated to any claims against third parties that could be made on Kristin's account. A month later, Jean McIntosh acknowledged those understandings of the health care plan and the employer but reserved her own right to seek a legal determination of the health care plan's and the employer's entitlement to reimbursement or subrogation related to any such money recovered.

In the spring of 1990, Jean McIntosh reached a settlement with the other persons involved in the accident. Under the terms of that agreement, those persons paid $250,500 in settlement of all claims against them related to Kristin's injuries from the accident. Those proceeds were placed into an escrow account pending resolution of

the question of Jean McIntosh's obligation to the health care plan and the employer.

In late 1990, Jean McIntosh sued in federal court, seeking a declaratory judgment that the health care plan and the employer had no right to the money received from the settlement with the other persons involved in the accident. In early 1992, after cross-motions for summary judgment and the submission of a stipulated record, the trial court granted summary judgment to Jean McIntosh and awarded attorney's fees to her. The health care plan and the employer appeal. We reverse the judgment of the trial court and vacate the award of attorney's fees, for the reasons stated below, and remand the case for the entry of a judgment in favor of the health care plan and the employer.

I.

The health care insurance contracts contains the following provisions:

> It is hereby agreed that in the event a Covered Person receives any benefits arising out of injury or illness, for which the Covered Person has, may have, or asserts any claim or rights to recovery against a third party or parties, then any . . . payments by the Plan for such benefits shall be made on the condition and with the agreement and understanding that the Plan will be reimbursed therefor by the Covered Person to the extent of . . . the amount or amounts received by the Covered Person from such third party or parties by way of settlement. . . .

> The Plan shall be subrogated to all claims, demands, actions and rights of recovery of the Covered Person against a third party or parties . . . to the extent of any and all payments made hereunder by the Plan in all jurisdictions where subrogation is lawfully permitted.

In its opinion granting summary judgment to Jean McIntosh, the trial court focused exclusively on the question of whether the health care plan and the employer could assert a right to subrogation under those provisions in a contract for health care insurance conceded by all of the parties to be governed by the Employee Retirement Income Security Act (ERISA), *see* 29 U.S.C. §§ 1001-1461. The trial court concluded that the preemptive effect of ERISA on state law, *See* 29 U.S.C. § 1144(a), did not extend to the subrogation right specified in the health care insurance contract at issue here and that Nebraska law would permit subrogation as to payments made by a minor's parent for medical expenses incurred by the minor. Interpreting the settlement agreement executed in this case, however, the trial court held that the proceeds consequent to that agreement were not intended to compensate Jean McIntosh for medical expenses incurred on Kristin's behalf, but instead were intended to compensate Kristin for her personal injuries (*e.g.*, physical pain and mental suffering, *see* NJI 2d § 4.00, § 4.01). The trial court held, therefore, that the health care plan and the employer were not entitled to receive the proceeds of the settlement.

On appeal, the health care plan and the employer contend, among other things, that the *first* paragraph quoted above from the health care insurance contract

creates an obligation for reimbursement that is separate from any right to subrogation under state law (which the health care plan and the employer consider to be the subject of the *second* paragraph quoted above) and therefore that the language of the settlement agreement is irrelevant. The health care plan and the employer offer several other arguments as well, but since we agree with the contentions asserted as to reimbursement, we need not reach those other issues.

II.

We agree that the two paragraphs quoted above refer to different obligations – that the first paragraph creates a contractual obligation for reimbursement and that the second paragraph deals with a statutory or common-law right to subrogation. We believe that the language of the health care insurance contract is plain in this respect and, if interpreted in any other way, would be inexplicably duplicative.

We are not sure why the trial court focused exclusively on the second paragraph, and we express no opinion on the merits of the trial court's analysis of the obligations associated with that paragraph. We believe, however, that the first paragraph quoted above controls the resolution of this case.

III.

It is undisputed that Kristin McIntosh is a "Covered Person" under the health care insurance contract. It is also undisputed that she received "benefits arising out of

injury or illness" from the health care plan. (Jean McIntosh argues at one point that the reference to "benefits" received by a "Covered Person," contained in the first clause of the first paragraph quoted above from the health care insurance contract, relates to any amounts received from a settlement with third parties. That argument makes no sense in the context of the entire clause, the entire sentence, or the health care insurance contract as a whole, which refers repeatedly to "benefits" in describing payments made by the health care plan under its coverage provisions. We therefore reject that aspect of Jean McIntosh's argument.)

The crux of the dispute before us is whether the phrase "for which the Covered Person has, may have, or asserts any claim or rights to recovery against a third party or parties" modifies "benefits" or "injury or illness," both of which precede it in the relevant sentence of the health care insurance contract. We note that the health care insurance contract defines "injury" as "an accidental bodily hurt which requires treatment by a Physician." We construe "claim or rights to recovery," furthermore, as including any assertion of entitlement to compensation, either for so-called "economic" damages, such as medical expenses and loss of earning capacity, or for so-called "noneconomic" damages, such as physical pain and mental suffering. *See* NJI 2d § 4.00, § 4.01, § 5.02, § 5.03, § 5.04.

Jean McIntosh's position is that the relevant sentence should be read as follows:

> It is hereby agreed that in the event a Covered Person [Kristin] receives any *benefits . . . for which* the Covered Person [Kristin] has, may have, or asserts any claim or rights to recovery

> against a third party or parties, then any . . . payments by the plan for such benefits . . . will be reimbursed . . . by the Covered Person [Kristin] to extent of . . . the amount or amounts received . . . from such third party or parties by way of settlement. . . . [emphasis supplied]

With this construction of the sentence, where the critical phrase modifies "benefits," Jean McIntosh argues that because the contract language requires reimbursement only for claims actionable by Kristin herself (and the settlement agreement specifies that the proceeds are for damages suffered by Kristin herself), because the benefits paid by the health care plan were for medical expenses, and because Kristin has no claim to medical expenses under Nebraska law (that claim belonging instead to her mother because of Kristin's minor status), the health care plan and the employer are *not* entitled to the proceeds of the settlement.

The health care plan's and the employer's position is that the relevant sentence should be read in this way:

> It is hereby agreed that in the event a Covered Person [Kristin] receives any benefits arising out of *injury or illness for which* the Covered Person [Kristin] has, may have, or asserts any claim or rights to recovery against a third party or parties, then any . . . payments by the Plan for such benefits . . . will be reimbursed . . . by the Covered Person [Kristin] to the extent of . . . the amount or amounts received . . . from such third party or parties by way of settlement. . . . [emphasis supplied]

With this construction of the sentence, where the critical phrase modifies "injury or illness," the health care plan

and the employer argue that because the medical expenses received by Kristin arose out of the physical injury from which all of her claims against third parties are derived, and because the contract language requires reimbursement for benefit payments by the health care plan associated with the physical injury sustained by Kristin if she receives a third-party settlement related to that physical injury, the health care plan and the employer *are* entitled to the proceeds of the settlement.

We hold that the health care plan's and the employer's construction of the language in the health care insurance contract is more reasonable than Jean McIntosh's construction of that language. We do so, in part, because the critical phrase appears directly after the words "injury or illness" in the relevant sentence. If the import of the health care insurance contract was to relate the claims asserted against a third party to the benefits paid by the health care plan, rather than to the physical injury or illness precipitating coverage, the intervening phrase "arising out of injury or illness" would be superfluous. We also note that interpreting the contract language in the manner urged by Jean McIntosh would lead to varying results, depending upon the random fact of whether the injured person was an adult or a minor. We find it illogical that the enforceability of a contract obligation should depend on so serendipitous a circumstance.

At oral argument, counsel for Jean McIntosh asserted that under the construction urged by the health care plan and the employer, and which we adopt, payments received by Kristin on account of a separate disability insurance policy would also be reachable for reimbursement purposes; counsel then suggested that such a result

would clearly be both illogical and unjust. We note, in response, that the health care insurance contract specifies recovery only of "amounts received . . . by way of settlement" from a third party and, therefore, would not ordinarily apply in circumstances where Kristin had personal coverage under a second insurance policy. It is true that the "settlement" might be in resolution of a disputed claim under a second insurance policy. In that event, however, the enforceability of the reimbursement obligation would again depend on happenstance – whether or not the claim under the second insurance policy was disputed. We decline to construe this contract in a way that would lead to such haphazard results.

IV.

For the reasons stated, then, we reverse the judgment of the trial court. Since the award of attorney's fees to Jean McIntosh was obviously predicated on the fact of a judgment in her favor, we also vacate that award. We remand the case for the entry of a judgment in favor of the health care plan and the employer.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-3621NEL

Jean A. McIntosh, etc., et al., Plaintiffs – Appellees, vs. Pacific Holding Company, et al., Defendants – Appellants.	* * * * * * * * *	Appeal from the United States District Court for the District of Nebraska

Appellees' petition for rehearing has been considered by the Court and is denied.

June 24, 1993

Order entered at the direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3621NEL

Jean A. McIntosh, Individually and as Conservator for Plaintiff Kristin K. McIntosh, a Protected Person,	*	Appeal from the United States District Court for the District of Nebraska
Appellee,	*	
vs.	*	
Pacific Holding company and Pacific Holding Company Employee Welfare Benefit Plan,	*	
Appellants.	*	

JUDGMENT

(Filed July 7, 1993)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed, the award of attorney's fees is vacated and the case is remanded for entry of judgment in accordance with the opinion of this court.

May 17, 1993

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED 7/1/93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEAN A. McINTOSH, etc.	)	4:CV90-L-471
Plaintiff,	)	JUDGMENT
vs.	)	(Filed July 26, 1993)
PACIFIC HOLDING COMPANY, et al.,	)	
Defendants.	)	

In accordance with the mandate of the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that judgment be entered for the defendants.

Dated July 23, 1993.

BY THE COURT

/s/ Warren K. Urbom
United States Senior
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEAN A. McINTOSH, individually and as Conservator for KRISTIN K. McINTOSH, a Protected Person, Plaintiff, vs. PACIFIC HOLDING COMPANY, et al., Defendants.	)	CV90-L-471 MEMORANDUM AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Filed March 6, 1992)

Jean McIntosh, individually and as conservator for Kristin McIntosh, brought this action against Pacific Holding Company ("Pacific") and the Pacific Holding Company Employee Welfare Benefit Plan ("Plan") seeking a declaratory judgment that the defendants have no right to reimbursement or subrogation from proceeds of a settlement with third-party tortfeasors. Jurisdiction is proper under 29 U.S.C. § 1104, 1105 and 1132 of the Employee Retirement Income Security Act (ERISA).

The case is presently before the court on cross motions for summary judgment and the parties have filed a statement of undisputed facts. (Filing 8.) Therefore, the motions may be resolved as a matter of law as only legal issues remain. Fed. R. Civ. P. 56(c); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990).

The relevant facts are set out in the statement of undisputed facts, (filing 8), and will not be repeated here. The legal dispute centers on whether the Plan may

enforce a subrogation agreement signed by Jean McIntosh for benefits paid to cover medical expenses resulting from an automobile accident in which Kristin McIntosh was seriously injured. The defendants argue the subrogation agreement must be given effect because any state law that would curtail subrogation is preempted by ERISA. On the other hand, the plaintiff argues that the terms of the settlement agreement preclude subrogation because there was no recovery for medical expenses that had been paid by the Plan. In addition, the Plan's subrogation clause is limited by its own terms in that it is authorized only in those "jurisdictions where subrogation is lawfully permitted." (Filing 2, Exh. A at 44.)

I. ERISA PREEMPTION UNDER 29 U.S.C. § 1144(a)

Section 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). According to the Supreme Court, this preemption clause is "conspicuous for its breadth," *FMC Corp. v. Holliday*, 59 U.S.L.W. 4009, 4011 (U.S. Nov. 27, 1990), and reaches state laws that have "a connection with or reference" an ERISA plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). Numerous courts have held that state statutory or common laws which interfere with a plan's right to subrogation "relate to" a plan within the meaning of section 1144(a) and are preempted by ERISA. *See, e.g., FMC Corp.*, 59 U.S.L.W. at 4011; *Baxter v. Lynn*, 886 F.2d 182, 185 (8th Cir. 1989).

In providing for federal preemption, Congress intended to bring uniformity to the regulation of

employee benefit plans by making them exclusively a federal concern. To this end, the plain language of the statute prevents state law from thrusting itself on an employee benefit plan so as to defeat the terms of that plan. *See, e.g., Provident Life and Accident Ins. Co. v. Linthicum,* 930 F.2d 14 (8th Cir. 1991) (claims that subrogation clause violated state's public policy and law prohibiting subrogation unless insured was first "made whole" were preempted).

It is important to note that ERISA preempts state laws regarding provisions set out in the Act as well as provisions of individual plans. *FMC Corp.*, 59 U.S.L.W. at 4011 (application of the preemption clause is not limited to "state laws dealing with the subject matters covered by ERISA"). For example, ERISA provides, by statutory terms, the exclusive civil enforcement scheme for claims arising under an employee benefit plan such that state law remedies are not available. 29 U.S.C. § 1132; *see, e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987). In addition, section 1144(a) preempts state subrogation laws that would interfere with a plan's right to subrogation even though subrogation is not directly addressed by the Act. *See, e.g., Baxter,* 886 F.2d at 185.

However, in this case, the plan has, by its own terms, attempted to make itself amenable to the applicable state law regarding subrogation. The subrogation clause specifically limits its application to "jurisdictions where subrogation is lawfully permitted." (Filing 2, Exh. A at 44.) If this clause were to be given effect, the plan would be subrogated to claims against third parties only if the applicable state law permitted subrogation. In other

words, federal preemption would be avoided by consent of the parties to the plan.

Our inquiry centers on whether state law may be incorporated by a plan such that the plan will have different rights depending upon the jurisdiction. Neither the parties nor my own research has produced case law addressing this precise issue. Several courts have, however, addressed whether parties may stipulate the remedy governing an ERISA claim.

In HECI Exploration Co. v. Holloway, 862 F.2d 513 (5th Cir. 1988), the Fifth Circuit Court of Appeals was not inclined to permit the parties to a bankruptcy to stipulate that state law remedies would govern an ERISA claim. *Id.* at 521. The court specifically disagreed with the district court's dicta which implied "that parties may *stipulate* that state law will govern an ERISA claim." *Id.* Rather, the court stated, "the district court's language, if taken literally, would be inconsistent with this clearly expressed concern for uniformity in the law governing employee benefit plans." *Id.* In support of its conclusion, the court relied on the Supreme Court's analysis in *Pilot Life* regarding the intended exclusivity of federal remedies.

In contrast to the Fifth Circuit's broad statement regarding parties' inability to stipulate to the governing law, state law has been applied in ERISA cases notwithstanding section 1144(a). In *Dueringer v. General American Life Ins. Co.*, 842 F.2d 127, *reh'g denied*, 853 F.2d 283 (5th Cir. 1988), the Fifth Circuit held an employee benefit plan had waived the defense of federal preemption by failing to raise it in the trial court proceedings. Because preemption involves a choice-of-law question, it must be raised

as an affirmative defense. *Id.* at 130; *see also Johnson v. Armored Transp.*, 813 F.2d 1041, 1043 (9th Cir. 1987) (waiver of preemption defense under the LMRA).

I do not believe either of these lines of cases addresses the issue in the present case. First, unlike the issue of available remedies, subrogation is not a subject matter addressed by ERISA. Second, state law is not being thrust upon the Plan to defeat its terms. Rather, the Plan has invited the applicable state law to become a part of the Plan's terms. Consequently, I do not find the Fifth Circuit cases helpful in determining whether the Plan's terms may be given effect.

This is so notwithstanding dicta to the contrary in *Provident Life and Accident Ins. Co. v. Linthicum*, 743 F. Supp. 662, 667 (W.D. Ark. 1990), *aff'd on other grounds*, 930 F.2d 14 (8th Cir. 1991). In that case, the covered individuals argued, *inter alia*, the plan should be bound by prior state court rulings such that it was not entitled to proceeds from an action against the third-party tortfeasors. The district court disagreed on the ground that the plan had not been a party to the state court proceeding and could not, therefore, be bound by the ruling in that case. In addition, the district court stated broadly, without explanation, that "even if [the plan] had somehow expressly or impliedly agreed that [state law] applied to or governed [its] obligations, such an agreement is of no effect when the subject matter of the litigation is a factual scenario governed by ERISA." *Id.* at 667 (citing *HECI Exploration*, 862 F.2d 513).

As discussed in the preceding paragraphs, this interpretation of the court of appeals' holding in *HECI*

Exploration misses the mark. *HECI Exploration* dealt with the parties' attempt to specify a different remedy than that provided by ERISA and should not be read to restrict a plan's choice of terms that are not inconsistent with provisions in the Act. Furthermore, in affirming the lower court's decision in *Provident Life,* the court of appeals failed to address the district court's interpretation of *HECI Exploration* and focused, instead, on the fact that the plan had been denied intervention in the state court proceedings and so was not bound by the ruling in that case. *Provident Life,* 930 F.2d at 16. Given the policy and case law applicable to the issue, I shall decline to give effect to the broad statement in dicta made by the lower court in *Provident Life.*

Neither do I find the policy reasons that have been presented in support of preemption to be applicable to these facts. With respect to the need for uniformity and ease of administration, the Supreme Court stated in *FMC Corp.:*

> "In the past, we have not hesitated to apply ERISA's preemption clause to state laws that risk subjecting plan administrators to conflicting state regulations. To require plan providers to design their programs in an environment of differing State regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits."

59 U.S.L.W. at 4011 (citations omitted). Similarly, the Supreme Court stated in an earlier case:

> "An employer that makes a commitment systematically to pay certain benefits undertakes a

> host of obligations. . . . The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others."

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987).

I do not believe the above-quoted policy considerations are applicable to a situation in which the plan subjects itself to non-uniformity by including policy terms whose effect is dependent upon state law. I can glean no evidence of an intent by Congress to preclude such policy terms. This is particularly so in light of another of ERISA's purposes; that is, "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines,* 463 U.S. at 90. The Plan's attempt to make itself compatible with state law provides additional benefit to employees in states where subrogation is not permitted. Giving effect to the Plan's limiting terms is, therefore, consistent with this Congressional intention. Furthermore, the Eight [sic] Circuit held in *Baxter* that plan provisions will prevail to the extent state law conflicts with or purports to invalidate a provision of an ERISA plan. *Baxter,* 886 F.2d at 185.

I find no reason to interfere with the provisions set forth in the Plan. I do not find support for the defendants' assertion that the Plan cannot incorporate by reference state law provisions that are not otherwise inconsistent with ERISA. For these reasons, I shall interpret the Plan by its plain meaning and look to Nebraska law to determine the Plan's rights to subrogation in this jurisdiction.

II. STANDARD OF REVIEW

As a preliminary matter, the parties argue for different standards of review. The defendants assert the Plan administrator's decision that subrogation is authorized must be upheld unless found to be arbitrary and capricious. The plaintiff, on the other hand, argues that a *de novo* review is proper because interpretation of state law is not a matter over which the Plan administrator has discretionary authority.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), the Supreme Court held that "a denial of benefits challenged under [an ERISA section] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan." The defendants claim that, since the Plan documents expressly grant the Plan administrator discretionary authority, the arbitrary and capricious standard of review applies. I do not agree that the Plan grants the administrator discretionary authority in interpreting state law. The Plan states, in pertinent part:

> "The Administrator shall administer the Plan in accordance with its terms. . . . shall interpret the Plan and determine all questions arising in the administration, interpretation, and application of the Plan. . . . In the exercise of its discretion, the Administrator shall not discriminate either for or against any Covered Employee, irrespective of such Covered Employee's level of compensation or position in the Company."

(Filing 2, Exh. A at 40.)

Under *Bruch*, the arbitrary and capricious standard applies to determinations regarding interpretation of a term in the plan or determination of eligibility for benefits. A decision as to whether or not Nebraska law permits subrogation cannot be considered a discretionary function even where the plan administrator is expressly granted discretion in interpreting and applying the terms of the plan. Rather, it is a question of law and a decision relating to that issue will be reviewed *de novo* by this court. *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1100 (5th Cir. 1990) (statutory interpretation by plan administrator was not entitled to deference). This *de novo* review requires the court to review the "employee's claim as it would have any other contract claim – by looking to the terms of the plan and other manifestations of the parties' intent." *Bruch*, 489 U.S. at 112-13.

III. SUBROGATION RIGHTS UNDER NEBRASKA LAW

Nebraska law permits subrogation in the insurance context. *See Milbank Ins. Co. v. Henry*, 232 Neb. 418, 441 N.W.2d 143 (1989). A subrogation clause "which gives an insurer a right to subrogation against a third-party

tortfeasor for medical payments actually made is a valid and enforceable contractual provision." *Id.* at 420, 441 N.W.2d at 145 (quoting *Travelers Indemnity Co. v. Vaccari*, 245 N.W.2d 844, 845-46 (Minn. 1976)). However, this rule does not end the inquiry, as Nebraska law also recognizes that two distinct causes of action arise when the injured person is a minor: the first accrues in favor of the minor herself for personal injuries; the second accrues to her parent or guardian for losses sustained on account of the injury. *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984). Under Nebraska law, "[t]he cause or right of action of parents is distinct from the cause of action of their child." *Id.* at 179, 343 N.W.2d at 60. Furthermore, any claim for medical expenses belongs exclusively to the minor's parents and cannot be brought by the minor herself. *Id.*; *see also Blue Cross/Blue Shield v. St. Cyr*, 459 A.2d 226, 228-29 (N.H. 1983) (minor child had no right to recover for medical expenses where parent, and not minor child, was liable for the medical expenses incurred on the child's behalf). It follows that, because "a party cannot acquire by subrogation any rights not possessed by the party whose rights are subrogated," *Gilbert v. First Nat'l Bank*, 154 Neb. 404, 415, 48 N.W.2d 401, 408 (1951), the Plan cannot be subrogated to a claim by Kristin.

It is, therefore, necessary to determine *who* recovered from the third-party tortfeasors and *what* the settlement proceeds were intended to compensate. Consistent with *Macku*, Jean McIntosh filed two separate state court actions against the third-party tortfeasors and their insurance carriers. These cases were entitled *Jean A. McIntosh, in her Capacity as Conservator for the Conservatorship of*

Kristin K. McIntosh, Plaintiff, vs. Leonard Hawkins, Defendant and *Jean A. McIntosh, Plaintiff, vs. Leonard Hawkins, Defendant*. Both cases were resolved by a settlement agreement to which Jean McIntosh, both individually and as conservator, and Pacific were parties. The settlement agreement provided, in pertinent part:

> "The parties agree that Conservator and Pacific shall accept payment of One Hundred Thousand Dollars ($100,000.00) from Hawkins and State Farm for damages claimed to have been suffered *by Conservator* as the result of the automobile accident. . . .
>
> "The parties agree that Conservator and Pacific shall accept payment of One Hundred Fifty Thousand Five Hundred Dollars ($150,000.00) [sic] from Stephens and Allied for damages claimed to have been suffered *by Conservator* as a result of the automobile accident. . . . "

(Filing 2, Exh. F ¶¶ III.B, III.C) (emphasis added).

By the plain terms of the settlement agreement, Jean McIntosh did not recover for her losses, including the medical expenses incurred for Kristin's care. Rather, the entire recovery was allocated to Kristin for her personal injuries. Under Nebraska law it is clear that the claim for Kristin's medical expense belongs only to Jean McIntosh in her parental capacity. *Macku*, 216 Neb. at 179, 343 N.W.2d at 60. The settlement, which the Plan participated in and agreed to, provided no recovery to Jean McIntosh in that capacity but allocated the entire proceeds as recovery for injuries incurred by the conservator for Kristin's personal injuries. Thus, the settlement provided absolutely no recovery for Kristin's medical expenses and

this recovery is not subject to the Plan's subrogation clause because the subrogation clause authorizes subrogation only from funds recovered for medical expenses paid by the Plan.

The defendants argue that the parent, in the discharge of the duty to care for his or her child, can bind the minor child to the subrogation clause of a medical services contract so that the minor is not able to defeat a subrogation clause, [sic] However, the cases upon which the defendants rely involved situations in which the insurance carrier was not a party to the settlement or court proceedings in which recovery was obtained. In those cases, the courts did not permit the insured or beneficiary to defeat a subrogation clause by artfully phrasing a settlement agreement to provide nothing, or very little, for medical expenses in lieu of a large settlement for the minor's personal injuries. *See, e.g., Dimick v. Lewis,* 497 A.2d 1221 (N.H. 1985) (subrogation rights cannot be jeopardized by unilateral allocation of only a small portion of settlement to the parents' recovery); *Hagerman v. Mutual Hosp. Ins., Inc.,* 371 N.E.2d 394 (Ind. 1978) (subrogation right upheld where minor brought sole action against tortfeasor and insurer was not party to settlement); *Hamrick v. Hospital Serv. Corp.,* 296 A.2d 15 (R.I. 1972) (child was bound by subrogation agreement where insurer was not party to child's settlement with tortfeasor for personal injury claim).

These cases are distinguishable because they involved unilateral actions intended to frustrate the insurer's subrogation rights. However, in this case, Pacific was a party to the settlement agreement and must now be content to live with the terms of the Plan and the

settlement agreement. Those terms intended to conform the Plan to state law regarding subrogation and the settlement awarded recovery to Kristin rather than her parent to whom the defendants were subrogated.

The Eighth Circuit opinion affirming *Provident Life* supports my conclusion that the Plan must be bound by its actions in the state court proceedings. In that case, the court of appeals held that the plan "was not bound by the prior state court order because [the plan] had been denied leave to intervene in the state lawsuit and thus it was not a party to those proceedings." *Provident Life*, 930 F.2d at 16. An opposite decision is warranted where the plan was party to a settlement in which the recovery was limited, by its express terms, to those injuries suffered by the minor rather than the medical expenses incurred by the parent.

In accordance with the plain terms of the Plan and the settlement agreement, I hold that the defendants are not entitled to any of the proceeds of the settlement agreement. The settlement proceeds were specifically allocated to compensate Kristin's injuries which did not include liability for medical expenses. The plaintiff's motion for summary judgment will be granted as a matter of law.

IV. COSTS AND ATTORNEY FEES

In certain cases brought under ERISA, attorney's fees may be awarded. Pursuant to 29 U.S.C. § 1132(g)(1), "[i]n any action under this subchapter . . . the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." This section should be read

broadly to permit a prevailing plan participant or beneficiary to ordinarily recover attorney's fees "unless special circumstances would render such an award unjust." *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421, 437 (E.D. Mo. 1984), *aff'd*, 780 F.2d 20 (8th Cir. 1985).

The Eighth Circuit has adopted a five-factor test to determine whether an award is appropriate. *Lawrence v. Westerhaus*, 749 F.2d 494 (8th Cir. 1984). This five-factor standard considers (1) the degree of culpability or bad faith of the losing party; (2) the ability of such party to satisfy an award of attorneys' fees; (3) whether such award would deter other persons acting under similar circumstances; (4) whether the action conferred a benefit on all participants and beneficiaries of an ERISA plan or sought to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. *Id.* at 496.

I do not believe the facts of this case warrant an award of attorney's fees. Of the five factors, three lean heavily in favor of the defendants. First, I do not find, and the plaintiff has not argued, that the defendants' actions relative to this suit were in bad faith. Second, the defendants articulated legitimate reasons for their position such that it could not be said that the defendants' position was totally without merit. Third, this action has not conferred a common benefit on a group of participants or beneficiaries.

As to the remaining factors, there is no indication the defendants would be unable to satisfy such a judgment. In addition, other plans might be deterred from forwarding such an interpretation of plan provisions if these

defendants are required to pay attorneys' fees. However, the deterrence factor is negligible given the particular nature of the plan provision at issue here. I must conclude that these factors, although tending to support a granting of fees, do not weigh heavily enough in favor of the plaintiff to shift the balance from the defendants. Therefore, I shall deny the request for costs and fees.

V. CONCLUSION

For the foregoing reasons, I conclude that ERISA does not preempt state law in this case because the terms of the policy specifically incorporate the applicable state law regarding subrogation. Furthermore, the Plan is not entitled to subrogation because, by the express terms of the settlement agreement, all settlement proceeds were intended to compensate Kristin's personal injuries to which the Plan is not entitled to subrogation. Jean McIntosh, in her individual capacity rather than as Conservator, was entitled to recover medical expenses from the tortfeasor. Because she did not share in the settlement proceeds, there is no recovery to which the Plan is entitled to subrogation.

IT IS THEREFORE ORDERED:

1. The defendants' motion for summary judgment, filing 9, is denied; and

2. The plaintiff's motion for summary judgment, filing 10, is granted.

Dated March 6, 1992.

BY THE COURT

/s/ Warren K. Urbom
United States
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEAN A. McINTOSH, individually and as Conservator for KRISTIN K. McINTOSH, a Protected Person, Plaintiff, vs. PACIFIC HOLDING COMPANY, et al., Defendants.	CV90-L-471 JUDGMENT (Filed March 6, 1992)

In accordance with the accompanying memorandum and order

IT IS HEREBY ORDERED that the defendants, Pacific Holding Company and the Pacific Holding Company Employee Welfare Benefit Plan, have no rights of subrogation to any of the settlement proceeds recovered by or on behalf of Kristin K. McIntosh and that the plaintiff, Jean A. McIntosh, as conservator of Kristin K. McIntosh, is entitled to all such settlement proceeds.

IT IS FURTHER ORDERED that nothing in this legal action shall be construed as altering the defendants' duty to continue to provide medical payments to all medical providers of Kristin K. McIntosh pursuant to the terms of the Plan.

Dated March 6, 1992.

BY THE COURT

/s/ Warren K. Urbom
United States
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEAN A. McINTOSH, etc. Plaintiff, vs. PACIFIC HOLDING COMPANY, et al., Defendants.	4:CV90-L-471 MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT OR, IN THE ALTERNATIVE, FOR PARTIAL NEW TRIAL (Filed Apr 17, 1992)

In an order dated March 6, 1992, this court entered a judgment in favor of the plaintiffs on its claim that the defendants had no subrogation rights with respect to the settlement proceeds recovered by and on behalf of an injured minor. (Filing 17). The accompanying memorandum and order also denied an award of attorney's fees to the plaintiffs. (Filing 16). The plaintiffs, as prevailing parties, have moved to amend that judgment to permit an award of attorney's fees or, in the alternative, for partial new trial on the issue of attorney's fees. According to the plaintiffs, they did not brief the issue of attorney's fees in conjunction with the motions for summary judgment because they believed it to be a collateral matter. (Mem. Br. in Supp. of Pls.' Mot. to Alter or Amend 10-11) (relying on *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-52; *Obin v. District No. 9 of !nt'l Ass'n of Machinists and Aerospace Workers*, 651 F.2d 574, 582 (8th Cir. 1981)).

I am inclined to grant the motion for partial new trial so as to provide the parties an opportunity to fully litigate the issue. Although the briefs submitted with respect to this motion address the propriety of attorney's fees in this case and the plaintiffs have filed some evidentiary materials, I shall decline to rule on the issue at this time. Instead, the parties have 14 days from the date of this order within which to file any additional evidence they deem relevant to the issue.

I further note that the granting of this motion renders ineffective the defendants' notice of appeal. *Campbell v. Wainwright,* 726 F.2d 702 (11th Cir. 1984). The court of appeals' appellate jurisdiction is divested as there no longer exists a final judgment. *Western Ind. v. Newcor Canada Ltd.,* 709 F.2d 16 (7th Cir. 1983). See Rule 4(a)(4) of the Federal Rules of Appellate Procedure.

IT IS HEREBY ORDERED that portion of the memorandum and order, (filing 16), denying the plaintiffs an award of attorney's fees is vacated.

IT IS FURTHER ORDERED the plaintiffs' motion for partial new trial on the issue of attorney's fees, (filing 18), is granted.

Dated April 16, 1992.

BY THE COURT

/s/ Warren K. Urbom
United States Senior
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEAN A. MCINTOSH, Individually and as Conservator for KRISTIN K. MCINTOSH, A Protected Person, Plaintiffs, vs. PACIFIC HOLDING COMPANY, and THE PACIFIC HOLDING COMPANY EMPLOYEE WELFARE BENEFIT PLAN, Defendants.	Case No. CV90-L-471 STATEMENT OF UNDISPUTED FACTS

1. Plaintiff Jean A. McIntosh, individually and as Conservator for Kristin K. McIntosh, a Protected Person, is a resident of Lincoln, Lancaster County, Nebraska. Jean McIntosh's daughter, Kristin McIntosh, is also a resident of Lincoln, Lancaster County, Nebraska. (Complaint, Paragraph 1; Answer, Paragraph 1.)

2. Pacific Holding Company ("Pacific") is the Plan Administrator of The Pacific Holding Company Employee Welfare Benefit Plan (the "Plan"). Pacific is a sole proprietorship and has its principal place of business in Los Angeles, California. (Complaint, Paragraph 2; Answer, Paragraph 1.)

3. Jean McIntosh is and was at all relevant times an employee of the Cornhusker Hotel, located in Lincoln, Lancaster County, Nebraska. As such, she was and is a "covered person," i.e., a beneficiary of the Plan. (Complaint, Paragraph 4 and Ex. A; Answer, Paragraph 3.) At

all times relevant, Kristin McIntosh was a minor dependent of Jean McIntosh. As such, Kristin McIntosh was and is a "covered person," i.e., a beneficiary, of the Plan because Kristin McIntosh is and was a "dependent" within the meaning of the Plan's definition of that term, and she has satisfied the "Dependent Eligibility" requirements of the Plan. (Complaint, Paragraph 5 and Ex. A; Answer, Paragraphs 3-4.)

4. Before the accident on July 31, 1988, Kristin McIntosh was a normal, healthy teenager. On July 31, 1988, Kristin McIntosh was a passenger in a vehicle driven by Andrea C. Stephens, which vehicle was owned by her father, Robert L. Stephens. (Complaint, Paragraph 7.) At the intersection of 11th and D Streets, Lincoln, Nebraska, the Stephens' vehicle was involved in a two-car accident with a vehicle owned and driven by Leonard Hawkins. (Complaint, Paragraph 7; Answer, Paragraph 4.) As a result of the accident, Kristin McIntosh sustained severe personal injuries. (Complaint, Paragraph 7; Answer, Paragraph 4.) Kristin McIntosh has suffered pain from her injuries and has suffered loss of enjoyment of life and she will incur pain and suffering and substantial loss of income and related damages for the remainder of her natural life. (Complaint, Paragraph 7.)

5. Medical care was required for the treatment of Kristin McIntosh's personal injuries sustained in the automobile accident of July 31, 1988. (Complaint, Paragraph 8; Answer, Paragraph 4.) Medical and related expenses in excess of Four Hundred and Thirty-Four Thousand and Two Hundred Dollars ($434,200.00) were

incurred for the necessary medical care of Kristin McIntosh resulting from her personal injuries. (Complaint, Paragraph 8; Answer, Paragraph 4.)

6. The accident of July 31, 1988 was caused by the negligence of Leonard Hawkins, the driver of the other vehicle involved. At the time of the accident, the vehicle Hawkins was driving was insured to a maximum of One Hundred Thousand Dollars ($100,000.00) under an insurance policy issued by the Nebraska Division of the State Farm Automobile Insurance Company of Bloomington, Illinois, Policy No. 2113 456-27A, which policy was in full force and effect on July 31, 1988. (Complaint, Paragraph 9 and Ex. B; Answer, Paragraph 5.)

7. Robert Stephens, the owner of the vehicle in which Kristin McIntosh was a passenger at the time of the accident, was insured under an insurance policy issued by Allied Mutual Insurance Company of Des Moines, Iowa, Policy No. AAP 0002599710-4, which policy was in full force and effect on July 31, 1988. The Allied policy provided underinsured motorist coverage in a maximum amount of Two Hundred and Fifty Thousand and Five Hundred Dollars ($250,500.00), of which only One Hundred and Fifty Thousand Dollars ($150,000.00) was available, due to the subrogation provision in the Allied policy. (Complaint, Paragraph 10 and Ex. C; Answer, Paragraph 5.)

8. Following the accident of July 31, 1988, Jean McIntosh filed claims with the Plan for medical and related expenses incurred for the treatment of Kristin McIntosh's personal injuries. Initially, the Plan made payments for these related expenses. However, Pacific

informed Jean McIntosh it would refuse to continue benefit payments on the claims submitted for Kristin McIntosh's necessary medical treatment unless and until Jean McIntosh executed a "subrogation" letter. Pacific also demanded, as a precondition to payment of medical benefits, that Jean McIntosh execute a document entitled "Acknowledgement and Agreement." (Complaint, Paragraphs 14-16 and Exs. D and E; Answer, Paragraph 6.)

9. Before signing either of these documents, Jean McIntosh sought and received assurances from Pacific that her execution of the "subrogation" letter and the document entitled "Acknowledgement and Agreement" would in no way alter Kristin McIntosh's rights under the Plan and that her execution of such documents would not enlarge the Plan's subrogation and reimbursement rights as set forth in the Plan. It was agreed that Jean McIntosh's execution of the "subrogation" letter, and the document entitled "Acknowledgement and Agreement," did not constitute a waiver or relinquishment of her rights and those of Kristin McIntosh to seek a judicial determination of the Plan's rights to subrogation or reimbursement, or lack thereof. (Complaint, Paragraphs 14-16 and Exs. D and E.)

10. On January 4, 1989, Jean McIntosh executed the previously-described "subrogation" letter and the "Acknowledgement and Agreement," including at the bottom of each such document a legend. This legend provided that Jean McIntosh's execution of such documents did not constitute a waiver or relinquishment of her rights and those of Kristin McIntosh to seek a judicial determination of the Plan's rights to subrogation or reimbursement, or lack thereof. (Complaint, Paragraph 16 and

Exs. D and E.) Thereafter, the Plan continued paying the medical expenses incurred on behalf of Kristin McIntosh by Jean McIntosh.

11. Kristin McIntosh continues to receive medical treatment and the Plan continues to make payment for these medical expenses. (Complaint, Paragraph 17.) The total benefits paid by the Plan to the medical providers of Kristin McIntosh, to date, exceeds Four Hundred and Thirty-Four Thousand and Two Hundred Dollars ($434,200.00). (Complaint, Paragraph 17; Answer, Paragraph 4.)

12. On approximately April 10, 1990, Jean McIntosh, individually and as Conservator of Kristin McIntosh, Pacific, Hawkins, State Farm, Robert Stephens, Andrea Stephens and Allied entered into a Settlement Agreement. (Complaint, Paragraph 18 and Ex. F; Answer, Paragraph 7.) The purpose of the Settlement Agreement was to settle the claims raised by Jean McIntosh, individually and as the Conservator for Kristin McIntosh, which had been asserted in two separate civil actions that were then pending in the District Court of Lancaster County, Nebraska. These cases were entitled, *Jean A. McIntosh, in her Capacity as Conservator for the Conservatorship of Kristin K. McIntosh, Plaintiff, vs. Leonard Hawkins, Defendant*, Case No. Docket 441, Page 232; and *Jean A. McIntosh, Plaintiff, vs. Leonard Hawkins, Defendant*, Case No. Docket 441, Page 233. (Complaint, Ex. F, p. 1.)

13. These proceeds are currently held by FirsTier Bank as escrow agent. (Complaint, Paragraph 18 and Ex. G.)

JEAN A. McINTOSH, Individually and as Conservator for KRISTIN K. McINTOSH, A Protected Person, Plaintiffs

By: HARDING & OGBORN and
TIM ENGLER – 15940
GREGORY D. BARTON – 18759
500 The Atrium, 1200 N Street
P. O. Box 82028
Lincoln, NE 68501-2028
(402) 475-6761

By: _____
One of Said Attorneys

PACIFIC HOLDING COMPANY, and THE PACIFIC HOLDING COMPANY EMPLOYEE WELFARE BENEFIT PLAN, Defendants

By: CLINE, WILLIAMS, WRIGHT, JOHNSON & OLDFATHER and
KATHLEEN JAUDZEMIS
1900 FirsTier Bank Bldg.
Lincoln, NE 68508
(402) 474-6900

By: _____
One of Said Attorneys

SUBROGATION

It is hereby agreed that in the event a Covered Person receives any benefits arising out of injury or illness for which the Covered Person has, may have, or asserts any claim or rights to recovery against a third party or parties, then any payment or payments by the Plan for such benefits shall be made on the condition and with the agreement and understanding that the Plan will be reimbursed therefor by the Covered Person to the extent of, but not exceeding the amount or amounts received by the Covered Person from such third party or parties by way of settlement or in such satisfaction of any judgment or judgments. The Covered Person shall do nothing to prejudice the rights of the Plan to such reimbursement and when requested by the Plan, the Covered Person shall excute [sic] and deliver any and all instruments and papers required by the Plan in order to assure the Plan's rights to such reimbursement.

The Plan shall be subrogated to all claims, demands, actions and rights of recovery of the Covered Person against a third party or parties and, or such third party or third parties' insurers to the extent of any and all payments made hereunder by the Plan in all jurisdictions where subrogation is lawfully permitted. The Covered Person hereby agrees that he shall execute and deliver any and all instruments and papers required by the Plan in order to protect the Plan's rights to subrogate as granted hereunder and, further, the Covered Person shall do whatever is requested or necessary in order to fully execute and to fully protect all the Plan's rights hereunder. The Covered Person shall do nothing to prejudice the rights of the Plan to such subrogation.

SETTLEMENT AGREEMENT

I. *Parties.* The parties to this Settlement Agreement are Jean A. McIntosh, Conservator of Kristin K. McIntosh, a protected person (hereinafter referred to as "Conservator"); Jean A. McIntosh, individually; Pacific Holding Corporation (hereinafter referred to as "Pacific"); Leonard Hawkins (hereinafter referred to as "Hawkins"); State Farm Mutual Automobile Insurance Company (hereinafter referred to as "State Farm"); Robert L. Stephens and Andrea Stephens (hereinafter referred to as "Stephens"); and Allied Mutual Insurance Company (hereinafter referred to as "Allied").

II. *Subject Matter.* This Settlement Agreement pertains to claims which has [sic] been made by Conservator and Jean A. McIntosh against Hawkins, and his insurance company, State Farm, and claims against Stephens, and their insurance company, Allied, with respect to injuries and damages which have been incurred by Conservator and McIntosh as the result of an automobile accident which occurred at the intersection of 11th and D streets in Lincoln, Lancaster County, Nebraska on July 31, 1988. Hawkins was the driver of one of the vehicles involved in the accident, and State Farm insured his vehicle. Kristin K. McIntosh was a passenger in the other vehicle in the accident which was driven by Andrea Stephens, owned by Robert L. Stephens, and insured by Allied. The claims have been asserted in two separate civil actions which have been filed and are currently pending in Lancaster County District Court, the first captioned: *Jean A. McIntosh, in her Capacity as Conservator for the Conservatorship of Kristin K. McIntosh, Plaintiff, vs. Leonard Hawkins, Defendant,* Docket 441, Page 232; and the second captioned:

Jean A. McIntosh, Plaintiff, vs. Leonard Hawkins, Defendant, Docket 441, Page 233. The State Farm policy provides for policy limits of $100,000 for bodily injury. The insurance policy of Allied has provisions for $500 for medical payments and an additional $150,000 for underinsured motorist coverage.

III. *Terms of Settlement.* In order to avoid the uncertainties and expenses of further litigation, the parties named in Paragraph I of this Settlement Agreement desire to compromise and settle the various disputed claims between and among themselves as a result of the automobile accident which occurred at the intersection of 11th and D streets in Lincoln, Lancaster County, Nebraska, which claims are at issue in the legal proceedings described in Paragraph II hereof. To that end, in consideration of the mutual promises recited herein, the parties agree to settlement of all of said claims on the following terms:

(A) This Settlement Agreement is subject to the approval of the Petition of Conservator Granting Authority to Compromise Claims, Execute Release, and Approve Settlement by the Lancaster County Court in the pending conservatorship proceeding appearing at Docket No. G-10615. If the Petition is approved by said Court, this Settlement Agreement shall be in full force and effect and shall continue in effect until the obligations of the parties hereunder are fulfilled in accordance with the provisions hereof or until such time as it shall be modified by voluntary agreement of each of the parties hereto. In the event the Petition is not approved by the Court, then all

rights and obligations of the parties pursuant to this Settlement Agreement shall be null and void and of no further force and effect.

(B) The parties agree that Conservator and Pacific shall accept payment of One Hundred Thousand Dollars ($100,000.00) from Hawkins and State Farm for damages claimed to have been suffered by Conservator as the result of the automobile accident which occurred on July 31, 1988 at the intersection of 11th and D Street in Lincoln, Lancaster County, Nebraska. Payment of said sum shall be made at the time of the execution of this Settlement Agreement, and the settlement draft shall be made payable to Conservator and Pacific.

(C) The parties agree that Conservator and Pacific shall accept payment of One Hundred Fifty Thousand Five Hundred Dollars ($150,500.00) from Stephens and Allied for damages claimed to have been suffered by Conservator as a result of the automobile accident which occurred on July 31, 1988 at the intersection of 11th and D streets in Lincoln, Lancaster County, Nebraska. Payment of said sum shall be made at the time of the execution of this Settlement Agreement, and the settlement draft shall be made payable to Conservator and Pacific.

(D) As an additional part of the consideration for this Settlement Agreement, Conservator, Jean A. McIntosh and Pacific hereby release and fully discharge Hawkins, State Farm, Stephens and Allied from any and all claims and causes of action of any kind

which they may have against such parties by reason of any matter, cause, happening or occurrence arising out of or related to the accident described in the lawsuits identified in Paragraph II hereof, regardless of whether such claims and causes of action are asserted or unasserted at this time. It is the intention of the parties that this Settlement Agreement shall not only constitute a general release, but also a covenant that Conservator, Jean A. McIntosh and Pacific shall never sue at any time Hawkins, State Farm, Stephens and Allied for any claims, demands, actions or causes of action that Conservator, Jean A. McIntosh and Pacific may have, may have had, or may hereafter have, by reason of the automobile accident which occurred on July 31, 1988 at the intersection of 11th and D streets in Lincoln, Lancaster County, Nebraska.

(E) As an additional part of the consideration for this Settlement Agreement, Conservator and McIntosh agree to execute whatever documents are necessary to effectuate a dismissal with prejudice of each of the claims described in Paragraph II above. The parties further agree that each party shall be responsible for the payment of their own court costs incurred in those actions.

(F) Conservator, Jean A. McIntosh, and Pacific hereby agree to indemnify and hold Hawkins, State Farm, Stephens and Allied harmless from any liability to Lincoln General Hospital or Immanuel Medical Center

as a result of any hospital liens filed pursuant to Section 52-401 of the Nebraska Revised Statutes (Reissue 1988).

(G) Conservator and Pacific agree that upon receipt of the payment of the settlement funds identified in Paragraphs III(B) and (C) above, that the funds will be deposited in an escrow account subject to the terms of an Escrow Agreement, a true and correct copy of which is attached hereto as Exhibit 1, which Conservator and Pacific further agree to execute simultaneously with the execution, of this Settlement Agreement. Nothing contained in this Settlement Agreement, nor the Escrow Agreement, shall be construed to constitute a waiver, release or alteration of the rights of Conservator or Pacific to the settlement funds. It is specifically understood and agreed by Conservator and Pacific that their respective legal rights to the settlement funds are not altered by the Settlement Agreement and the Escrow Agreement.

IV. *Miscellaneous Provisions.*

(A) This Settlement Agreement is executed by the parties hereto for the sole purpose of resolving the matters involved herein, and it is expressly understood and agreed, as a condition hereof, that this Settlement Agreement shall not constitute, nor shall it be construed to be an admission of any party as to any of the allegations contained in the civil actions identified in Paragraph II, nor shall it evidence or indicate in any

manner an admission of the truth of any claims asserted therein.

(B) The parties hereto agree that no statements or representations made by or on behalf of any party or parties hereto have influenced or induced any other party to enter into this Settlement Agreement.

(C) This document represents the entire and integrated Settlement Agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral, regarding settlement of this matter. No representation which is not specifically contained herein shall be admissible to establish the inducement of this Settlement Agreement.

(D) Each of the covenants and promises made herein by each party hereto is made in consideration of each and all of the covenants and promises made herein by the other parties hereto and this Settlement Agreement is intended to be entire and indivisible.

(E) The parties agree that the terms of this Settlement Agreement shall be binding on their heirs, successors and assigns.

(F) Any condition of this Settlement Agreement which may be legally waived may be waived at any time by any party hereto which is entitled to the benefit of that condition, but only if such waiver is evidenced by a written instrument. No waiver of the provisions of this Settlement Agreement shall be deemed or shall constitute a waiver of any other provision, nor shall any waiver constitute a continuing waiver.

(G) This Settlement Agreement may be executed by the parties in any number of duplicate originals with the same effect as if the same signatures of each duplicate original were upon the same instrument.

DATED this 9 day of April, 1990.

JEAN A. McINTOSH, Conservator for the Conservatorship of Kristin K. McIntosh, a Protected Person

By: /s/ Jean A. McIntosh

APPROVED BY:

HARDING & OGBORN
TIM ENGLER - 15940
500 The Atrium, 1200 N Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 475-6761

/s/ Tim Engler
Attorney for Jean A. McIntosh, Conservator for Kristin K. McIntosh, A Protect [sic] Person

DATED this 9 day of April, 1990.

JEAN A. McINTOSH

By: /s/ Jean A. McIntosh

APPROVED BY:

HARDING & OGBORN
TIM ENGLER - 15940
500 The Atrium, 1200 N Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 475-6761

/s/ Tim Engler
Attorney for Jean A. McIntosh

DATED this 20th day of March, 1990.

LEONARD HAWKINS

By: /s/ Patrick W. Healey

STATE FARM
MUTUAL AUTOMOBILE
INSURANCE COMPANY

By: /s/ Patrick W. Healey

APPROVED BY:

HEALEY, WIELAND, KLUENDER
ATWOOD, JACOBS & GREER and
PATRICK W. HEALEY
1141 H. Street
Box 83104
Lincoln, NE 68501

/s/ Patrick W. Healey
Attorney for Leonard Hawkins and
State Farm Mutual Automobile
Insurance Company

DATED this 10 day of April, 1990.

PACIFIC HOLDING COMPANY

By: /s/ James F. Tatom

APPROVED BY:

KATHLEEN A. JAUDZEMIS
CLINE, WILLIAMS, WRIGHT,
JOHNSON & OLDFATHER
1900 FIRSTIER BANK BLDG.
LINCOLN, NE 68508
(402) 474-6900

/s/ Kathleen A. Jaudzemis
Attorney for Pacific Holding
Company

DATED this 10 day of April, 1990.

ROBERT L. STEPHENS

By: /s/ Robert L. Stephens

ANDREA STEPHENS

By: /s/ Andrea Stephens

ALLIED MUTUAL
INSURANCE GROUP
By: /s/ Richard Knight

ESCROW AGREEMENT

THIS ESCROW AGREEMENT is effective as of ___, 1990, among Jean A. McIntosh, conservator for Kristin K. McIntosh, a protected person (hereinafter referred to as "Conservator"), Pacific Holding Company (hereinafter referred to as "Pacific"), and FirsTier Bank, National Association, Lincoln, Nebraska (hereinafter referred to as the "Escrow Agent").

RECITAL

Conservator and Pacific are parties to a Settlement Agreement dated ___, 1990 which will convey to Conservator and Pacific the total sum of Two Hundred Fifty Thousand and Five Hundred Dollars ($250,500.00). Pursuant to the terms of the Settlement Agreement, the parties desire the appointment of the Escrow Agent and to provide instructions as to the disbursement of the escrow funds.

NOW, THEREFORE, IN CONSIDERATION of the covenants and agreements contained in this Escrow Agreement, it is agreed as follows:

ARTICLE I.
APPOINTMENT OF ESCROW AGENT

The Escrow Agent is hereby appointed to receive, invest and release certain funds as set forth in this Escrow Agreement. The Escrow Agent shall have no duties other than those set forth herein and shall not be bound in any other way by any other agreement or contract between Conservator and Pacific.

ARTICLE II.
DEPOSIT OF FUNDS

Upon receipt of the funds pursuant to the Settlement Agreement, Conservator and Pacific will deposit Two Hundred Fifty Thousand and Five Hundred Dollars ($250,500.00) with the Escrow Agent. The escrow funds shall be held, invested and released by the Escrow Agent in accordance with the terms and conditions set forth in this Escrow Agreement.

ARTICLE III.
INVESTMENT OF ESCROWED FUNDS

Upon receipt of the escrow funds, the Escrow Agent shall invest the same and retain liquidity of the escrow funds which will allow immediate distribution of the escrow funds upon receiving notice of disbursement in accordance with Article IV hereof.

ARTICLE IV.
DISTRIBUTION OF ESCROW FUNDS

The escrow funds shall be held by the Escrow Agent until final disposition is made. Final disposition shall be made following written notice to the Escrow Agent by Conservator and Pacific. Said notice shall instruct the Escrow Agent as follows:

(a) In the event the parties proceed with a declaratory judgment action to determine their respective rights in the escrow funds, the notice shall specify to the Escrow Agent the outcome of said litigation, and the escrow funds shall be disbursed by the

Escrow Agent in accordance with the final decision of a court of competent jurisdiction, including any appeals. The notice shall be accompanied with a certified copy of the judgment, and the notice shall be signed by both Pacific and Conservator.

(b) In the event Pacific and Conservator enter into a compromise and settlement as to their respective rights to the escrow funds, said notice shall contain specific instructions as to the amount of funds to be distributed to each party. The notice shall be accompanied by a copy of a duly executed settlement agreement and the notice shall be signed by both Pacific and Conservator.

(c) Any interest earned on the escrow funds shall be paid in accordance with (a) and (b) above.

ARTICLE V.
ESCROW AGENT'S RESPONSIBILITIES

The following provisions shall govern and control with respect to the rights, duties, liabilities and immunities of Escrow Agent:

(a) Escrow Agent is not a party to, and is not bound by, the Settlement Agreement or any other agreement out of which this escrow may arise.

(b) Escrow Agent acts hereunder as a depository only, and is not responsible or liable in any manner for the sufficiency, correctness, genuineness or validity of the Deposit.

(c) Escrow Agent shall be entitled to rely upon and shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document which Escrow Agent in good faith believes to be genuine and to be signed by the proper person, may assume the validity and accuracy of any statement or assertion contained in such written communication, and may assume that any person purporting to give any such writing has been duly authorized to do so.

(d) Escrow Agent shall not be liable for any error of judgment or any act done or step taken or omitted by it in good faith, or for any mistake of fact or law, or for anything which it may do or refrain from doing in connection herewith, except in all cases for its own willful default or misconduct or gross negligence.

(e) Escrow Agent shall not be liable in any manner for the sufficiency or correctness as to form, manner, execution or validity of any instrument deposited in escrow, nor as to the identity, authority or right of any person executing the same, and its duties hereunder shall be limited to the safekeeping of the deposit, and other monies, instruments or other documents received by it as an escrow holder, and for the disposition of same in accordance with the terms and provisions of this Agreement.

(f) Escrow Agent may consult with, and obtain advice from, legal counsel of its own choice in the event of any dispute or question as to the construction of any of the provisions

hereof or its duties hereunder, and it shall incur no liability and shall be fully protected in acting in good faith in accordance with the advice of such counsel.

(g) All expenses of Escrow Agent in connection with the performance of its services hereunder shall be borne one-half by Conservator and one-half by Pacific.

ARTICLE VI.
INDEMNIFICATION OF ESCROW AGENT

Unless Escrow Agent discharges any of its duties hereunder in a grossly negligent manner or is guilty of willful default or misconduct with regard to its duties hereunder, the other parties hereto hereby indemnify Escrow Agent and hold it harmless from any and all claims, liabilities, losses, actions, suits or proceedings at law or in equity, or any other expenses, fees, or charges of any character or nature, which it may incur or with which it may be threatened by reason of its acting as Escrow Agent under this Agreement; and in connection herewith, to indemnify Escrow Agent against any and all expenses, including reasonable attorney's fees and the cost of defending any action, suit or proceeding or resisting any claim.

ARTICLE VII.
DISPUTE

Escrow Agent may, at its option, in the event of any dispute or potential dispute as to the disposition of all or any part of the deposit, the interpretation of this Agreement, or for any other reason which Escrow Agent shall

determine, commence an action in the nature of an interpleader and seek to deposit such deposit in dispute in the Lancaster County, Nebraska District Court, and the remaining parties hereto shall be permitted to pursue their remedies and claims in such Court. In such event, Escrow Agent shall be indemnified for all costs, including reasonable attorney's fees, in connection with such civil action, and at its option shall be entitled, without liability to either of the other parties hereto, to suspend all or any part of its activities, obligations and duties hereunder until final resolution of such civil action.

ARTICLE VIII.
RESIGNATION OF ESCROW AGENT

Escrow Agent may resign upon thirty (30) days written notice to the other parties to this Agreement. If a successor Escrow Agent is not appointed within this thirty (30) day period, Escrow Agent may petition a court of competent jurisdiction to name a successor.

ARTICLE IX.
FEES

Escrow Agent shall be entitled to receive as compensation for its services as escrow agent a fee as may be agreed upon by separate letter between it and the remaining parties hereto. If such separate letter agreement is not made, Escrow Agent's customary charges for acting as escrow agent under its regularly published schedule of compensation in effect at such time as the services are rendered shall be charged. All fees charged by Escrow

Agent shall be paid one-half by Conservator and one-half by Pacific.

ARTICLE X.
NOTICE

Any notice, instruction or communication which may be or is required to be given pursuant to this Escrow Agreement shall be in writing and shall be mailed first class, postage prepaid, by registered or certified United States mail, as follows:

To Pacific: Kathleen A. Jaudzemis
Cline, Williams, Wright,
Johnson & Oldfather
1900 FirsTier Bank Bldg.
Lincoln, NE 68508
(402) 474-6900

To Conservator: Tim Engler
500 The Atrium
1200 N Street
P.O. Box 82028
Lincoln, NE 68508
(402) 475-6761

To the Escrow Agent: FirsTier Bank Lincoln
13th and M Street
Lincoln, NE 68508
Attn: Lavon McBride
(402) 434-1481

or to such other address as may be specified in a notice complying with this Article.

IN WITNESS WHEREOF, the parties hereto have executed this Escrow Agreement on this ___ day of ___, 1990.

JEAN A. McINTOSH,
Conservator for KRISTIN K.
McINTOSH, A PROTECTED
PERSON

_____

PACIFIC HOLDING COMPANY

By: _____
Its _____

FIRSTIER BANK, NATIONAL
ASSOCIATION, LINCOLN,
NEBRASKA

By: _____
Authorized Officer

_____

FILED
OCT 18 1993
OFFICE OF THE CLERK

No. 93-443

In The

Supreme Court of the United States

October Term, 1993

JEAN A. McINTOSH, Individually and as Conservator for KRISTIN K. McINTOSH, A Protected Person,

Petitioner,

vs.

PACIFIC HOLDING COMPANY and THE PACIFIC HOLDING COMPANY EMPLOYEE WELFARE BENEFIT PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

SHAWN D. RENNER
CLINE, WILLIAMS, WRIGHT, JOHNSON & OLDFATHER
1900 FirsTier Bank Building
Lincoln, Nebraska 68508
Telephone: (402) 474-6900
Counsel of Record for Respondents Pacific Holding Company and Pacific Holding Company Employee Welfare Plan

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals was correct in determining that The Pacific Holding Company Employee Welfare Benefit Plan, which is regulated by the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. Sections 1101-1461, was entitled to reimbursement of medical benefits paid to a covered person by the plan from settlement proceeds recovered on behalf of the covered person from third parties when such reimbursement was specifically required by the plan.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 2

1. IN REQUIRING REIMBURSEMENT OF THE EMPLOYEE BENEFIT PLAN, THE PLAN ADMINISTRATOR ACTED CONSISTENTLY WITH THE CLEAR LANGUAGE OF THE PLAN 2

   (a) The Circuit Courts of Appeals Have Consistently Looked to the Plain Language of ERISA-Regulated Benefit Plans to Determine if the Plans are Entitled to Reimbursement or Subrogation From Plan Beneficiaries and Have Only Limited Recovery by a Plan When the Plan Itself Limited Such Recovery 2

   (b) The Plan's Administrator Acted Within Its Discretion in Determining that the Plan's Reimbursement Provision Requires the Plan to Be Reimbursed From the Settlement Obtained by the Beneficiary 3

2. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING LIMITATIONS ON AN ERISA PLAN'S REIMBURSEMENT OR SUBROGATION RIGHTS 4

3. NO SIGNIFICANT ISSUE EXISTS, UNRESOLVED BY THIS COURT, CONCERNING THE LIMITS ON AN ERISA PLAN'S ABILITY TO IMPOSE CONDITIONS UPON A BENEFICIARY FOR REIMBURSEMENT 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Cutting v. Jerome Foods, Inc., 993 F.2d 1293 (7th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3150 (Oct. 12, 1993) 5, 8, 10

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 3, 9

Jacobs v. Pickands Mather Co., 933 F.2d 652 (8th Cir. 1991) 3

Jones v. SONAT, Inc. Emp. Ben. Plan Admin. Com., 997 F.2d 113 (5th Cir. 1993) 5, 7

Liberty Corp. v. NCNB Nat. Bank of South Carolina, 984 F.2d 1383 (4th Cir. 1993) 4, 5, 6, 7

McIntosh v. Pacific Holding Company et al., 992 F.2d 882 (8th Cir. 1993) 2, 11

Meadows By and Through Meadows v. Cagle's, Inc., 954 F.2d 686 (11th Cir. 1992) 3

Mertens v. Hewitt Associates, 508 U.S. ___, 124 L.Ed.2d 161 (1993) 10

Shelter Ins. Co. v. Frohlich, 243 Neb. 111, 498 N.W.2d 74 (1993) 9

STATEMENT OF THE CASE

Petitioner Jean A. McIntosh and her minor daughter, Kristin, were "Covered Persons" under The Pacific Holding Company Employee Welfare Benefit Plan (the "Plan"), a self-funded, qualified, benefit plan under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1101-1461, and were therefore eligible for health benefits. Kristin was injured in a car accident and the Plan has paid for her substantial medical expenses, which exceeded $434,000 as of January, 1991. By virtue of a settlement, $250,500 was recovered from insurers of the owner of the vehicle in which Kristin was a passenger and from the driver of the vehicle which caused the accident. The Plan claimed that it was entitled to these funds pursuant to either of the separate and distinct reimbursement and subrogation provisions contained in the Plan. Jean McIntosh contended that the settlement proceeds were paid entirely in satisfaction of Kristin's non-medical damages and therefore were not subject to the reimbursement or subrogation provisions of the Plan.

Jean McIntosh, individually and as Kristin's conservator, brought suit in the United States District Court for the District of Nebraska seeking a declaration that the Plan had no reimbursement or subrogation rights to the settlement proceeds, and that Jean was entitled to the proceeds as Kristin's conservator. The district court granted McIntosh's motion for summary judgment and denied Respondents' cross motion for summary judgment. On appeal, the Eighth Circuit Court of Appeals reversed the district court's decision and determined that based on the plain language of the Plan, the Plan had a

right to be reimbursed from the proceeds of the settlement. The court specifically held that the Plan provided for a right of reimbursement distinct from any subrogation right, a point raised before but not decided by the district court. *McIntosh v. Pacific Holding Company*, 992 F.2d 882, 884-85 (8th Cir. 1993). The Court of Appeals found it unnecessary to determine whether the agreement settling the personal injury claims had any effect on which party was entitled to the settlement proceeds. The case was remanded with directions to enter judgment in favor of the Respondents.

ARGUMENT

1. IN REQUIRING REIMBURSEMENT OF THE EMPLOYEE BENEFIT PLAN, THE PLAN ADMINISTRATOR ACTED CONSISTENTLY WITH THE CLEAR LANGUAGE OF THE PLAN.

(a) The Circuit Courts of Appeals Have Consistently Looked to the Plain Language of ERISA-Regulated Benefit Plans to Determine if the Plans are Entitled to Reimbursement or Subrogation From Plan Beneficiaries and Have Only Limited Recovery by a Plan When the Plan Itself Limited Such Recovery.

As determined by the Eighth Circuit Court of Appeals, the language of the Plan provides that the Plan is entitled to reimbursement from settlements received by Plan beneficiaries. 992 F.2d at 885. The Plan specifically provides that its administrator has discretionary authority to interpret the provisions of the Plan. Because the language of the Plan specifically requires reimbursement

by the Petitioner of the money she received in settlement, the Plan administrator did not abuse its discretion in requiring the Petitioner to reimburse the Plan. The decision by Eighth Circuit Court of Appeals in this case is consistent with prior decisions involving ERISA-regulated plans, which emphasize the importance of relying upon the clear language of such plans. *See, e.g., Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101 (1989); *Meadows By and Through Meadows v. Cagle's, Inc.,* 954 F.2d 686 (11th Cir. 1992) (plan language is controlling when it addresses substantive rights of parties); *Jacobs v. Pickands Mather Co.,* 933 F.2d 652 (8th Cir. 1991).

The Respondents urge this Court to deny the Petition for Writ of Certiorari because the Eighth Circuit Court of Appeals determined the controlling issue to be one of plan interpretation, which does not warrant this Court's attention.

(b) The Plan's Administrator Acted Within Its Discretion in Determining that the Plan's Reimbursement Provision Requires the Plan to Be Reimbursed From the Settlement Obtained by the Beneficiary.

Under *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), a deferential standard of review of plan benefit decisions is appropriate if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115. The Plan provides precisely such discretionary authority, as follows:

Powers and Duties.

> The Administrator shall administer the Plan in accordance with its terms. . . . shall interpret the Plan and determine all questions arising in the administration, interpretation, and application of the Plan. . . . In the exercise of its discretion, the Administrator shall not discriminate either for or against any Covered Employee, irrespective of such Covered ~~Employee's~~ level of compensation or position in the Company.

(App. to Petition at 21). The administrator's interpretation of the Plan's reimbursement provision is clearly permissible since the interpretation is wholly consistent with the plan language of the Plan. In its decision, the Eighth Circuit agreed that the administrator's interpretation of the Plan's reimbursement clause was the most reasonable one and the only one which would not lead to haphazard results. 992 F.2d at 885.

2. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING LIMITATIONS ON AN ERISA PLAN'S REIMBURSEMENT OR SUBROGATION RIGHTS.

Petitioner asks this Court to hear this case based, in part, on the claim that there is a split among the Circuit Courts of Appeal with regard to whether ERISA limits the types of reimbursement or subrogation which an ERISA-regulated plan may obtain when plan beneficiaries enter into settlements with third parties. In claiming that a conflict exists among the Fourth, Fifth, Seventh and Eighth Circuits, Petitioner cites the Eighth Circuit's decision in this case and three other cases: *Liberty Corp. v.*

NCNB Nat. Bank of South Carolina, 984 F.2d 1383 (4th Cir. 1993); *Jones v. SONAT, Inc. Emp. Ben. Plan Admin. Com.*, 997 F.2d 113 (5th Cir. 1993); and *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3150 (Oct. 12, 1993).

Petitioner's perception of a conflict is incorrect. In each of the four cited cases, the ability of the benefit plan to require reimbursement or subrogation from third parties was based upon the language contained in the particular plan. In none of the cases did the reviewing court find that either ERISA statutory or common law limited the type or nature of reimbursement or subrogation to which the plan in question was entitled. In the two cases in which a plan was denied subrogation or setoff (*Liberty Corp.* and *Jones*), the denial was based on the fact that the plans themselves limited the circumstances under which setoff or subrogation would be allowed. The administrators of the plans attempted to obtain setoff or subrogation in situations which were not contemplated by the provisions of the plans.

In this case, the Eighth Circuit did not construe the provisions of, or discuss any public policy issues in connection with, ERISA. What was relevant to the Court of Appeals was that the language of the Plan clearly permitted reimbursement from the settlement received by the beneficiary. The Plan states:

> It is hereby agreed that in the event a Covered Person receives *any benefits* arising out of injury or illness for which the Covered Person has, may have, or asserts *any claim or rights to recovery* against a third party or parties, then any payment or payments by the Plan for such benefits shall be made on the condition and with the

> agreement and understanding that the Plan will be reimbursed therefor by the Covered Person to the extent of, but not exceeding the amount or amounts received by the Covered Person from such third party or parties by way of settlement . . .

(App. to Petition at 38) (emphasis added).

The employee benefit plan in *Liberty Corp.* was significantly different from the Plan in this case. The *Liberty Corp.* plan subrogation provision provided:

> Payment made for charges must be returned to the Plan if . . . benefits are paid to or on behalf of a Covered Individual who has . . . Medical or Dental charges . . . for which a third party is acknowledgedly liable or found to be legally liable by a Court of competent jurisdiction.

984 F.2d at 1385, n.1. The court observed that with that rather limited language, the beneficiary "subrogated to Liberty only his right to recover from third parties compensation for his medical expenses." *Liberty Corp.*, 984 F.2d at 1388 (emphasis added). The Fourth Circuit held that the beneficiary did not have to reimburse the plan because the amount which the plan sought to recover "was indisputably only for wrongful death" and not for medical expenses; by the plan's own terms, such a payment did not trigger the reimbursement obligation. The court did review whether state laws in certain cases may be incorporated into ERISA. However, such review was undertaken solely for the purpose of determining whether the benefit for which reimbursement was sought was a medical benefit or not. The Fourth Circuit did not make any decision, or even any reference to, whether

ERISA-regulated plans are limited solely to reimbursement or subrogation for medical expenses even if the plan specifically permits recovery from payments made for non-medical expenses.

The Petitioner contends that the "facts relevant to the 'reimbursement/subrogation' issue in *Liberty Corp.* are indistinguishable from the facts relevant to the 'reimbursement/subrogation' issue in this case." Petition for Writ of Certiorari at 19. Petitioner's argument ignores the distinction between the Plan in the instant case, which provides a contractual right to receive reimbursement from any settlement arising out of the injury received by the beneficiary, and Liberty's plan, which was interpreted as providing no subrogation right for non-medical settlement proceeds. Hence, the decisions do not conflict.

In *Jones*, the Fifth Circuit denied a setoff claim based on a provision of the employee benefit plan which provided that "any plan benefits to which Jones [the beneficiary] was entitled would be further reduced by the full amount of any 'payment for disability' that he received under the [Louisiana Workers' Compensation Act] or other worker's compensation scheme 'or any legislation of similar purpose, which payment arises as a result of a disability.' " *Jones*, 997 F.2d at 114. Jones was awarded a settlement under the Jones Act that specifically excluded any claims arising out of his employee benefit plan. The benefit plan argued that the settlement was under legislation similar to workers' compensation. The Fifth Circuit determined that the plan had no right to setoff because the "SONAT [Plan] Committee unfairly characterized Jones's settlement as a worker's compensation settlement or one 'pursuant to . . . any other legislation or similar

purpose' which would be covered by Section 3.04." *Id.* In other words, the court simply interpreted the plan provisions differently than the administrator. In making its decision, the Fifth Circuit did not determine whether ERISA or federal common law affected the plan's right to receive the proceeds of the settlement, but based its reasoning solely on the language of the plan. Again, that is precisely what was done in the case at bar.

The benefit plan in *Cutting* permitted the plan to be "subrogated to all claims, demands, actions and rights of recovery of the individual against any third party or any insurer, including Workers' Compensation, to the extent of any and all payments made or to be made hereunder by the Plan." *Cutting*, 993 F.2d at 1295. The Seventh Circuit rejected the beneficiary's claim that she did not have to reimburse the plan unless she fully recovered for her various losses (a claim first made by the Petitioner in this Court). The court based its decision on the language of the plan and held that the plan had a right to subrogation.

In each of the four cases cited by the Petitioner, the Circuit Court based its conclusion on the language of the benefit plan under review. In that respect, the decisions are entirely consistent. Because the cases involved only the interpretations of the various plans, the Petitioner is incorrect in asserting that a conflict of law exists among the circuits.

3. NO SIGNIFICANT ISSUE EXISTS, UNRESOLVED BY THIS COURT, CONCERNING THE LIMITS ON AN ERISA PLAN'S ABILITY TO IMPOSE CONDITIONS UPON A BENEFICIARY FOR REIMBURSEMENT.

The Petitioner has asked this Court to create two public policies. They are:

1. The enforcement of reimbursement or subrogation clauses in ERISA-regulated plans should be limited, as a matter of federal common law, to recovering only from certain types of settlements, regardless of the plan language.

2. No ERISA-regulated plan should have a right to reimbursement or subrogation until the beneficiary has received "full recovery."

In asking this Court to adopt these new policies, the Petitioner does not cite any provisions of ERISA or any applicable case law for support. In *Bruch*, this Court required the courts to look to the terms of the plans themselves to determine the respective rights of the beneficiaries and the plans. *Id.* at 115. That is what the Eighth Circuit did in this case. Furthermore, that was done in each of the cases cited by Petitioner.

Petitioner's argument regarding "full recovery" has no applicability here, and raises no significant issue, for two reasons. First, this argument was not made by Petitioner in the district court, and was not presented to the Court of Appeals until Petitioner sought rehearing; it thus cannot properly be raised here. Second, *Shelter Ins. Co. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993), which Petitioner argues establishes a "full recovery" limitation

that must be imposed on ERISA plan subrogation or reimbursement rights as a matter of federal common law, specifically recognizes that the supposed "full recovery" rule does not apply where the contract in question "provides for subrogation on payment of less than the full amount of a debt or loss. . . . " *Id.* at 117-118, 498 N.W.2d at 78-79. *See Cutting, supra,* 993 F.2d at 1296-97 (collecting cases).

There simply is no support in the record for the argument that the result in this case is so unconscionable or egregious as to violate some unannounced federal public policy. Moreover, the Petitioner suggests no guidelines for this Court to use in determining the limits on the nature of reimbursement or subrogation to which a plan is entitled. Instead, the Petitioner asks this Court to disregard its past holdings and to impose on ERISA-regulated plans arbitrary new rights. The long-term effect of adopting the Petitioner's position would be to make ERISA-regulated plans more costly, which would eventually result in the reduction of other benefits provided to employees. *See Cutting, supra,* 993 F.2d at 1297-98.

ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful and competing interests – not all in favor of potential plaintiffs." *Mertens v. Hewitt Associates,* 508 U.S. ___, ___, 124 L.Ed.2d 161, 174 (1993). The decision of the Court of Appeals is wholly consistent with the statute, as construed by this Court. The Court should reject Petitioner's invitation to make from the whole cloth of federal common law a garment not woven by Congress in the fabric of the statute.

CONCLUSION

For the foregoing reasons, Respondents Pacific Holding Company and The Pacific Holding Company Employee Welfare Benefit Plan pray that a Writ of Certiorari not be issued from this Honorable Court to review the Judgment of the United States Court of Appeals for the Eighth Circuit in *McIntosh v. Pacific Holding Company et al.*, 992 F.2d 882 (8th Cir. 1993).

Respectfully submitted,

Pacific Holding Company and
Pacific Holding Company Employee
Welfare Plan, Respondents

By: SHAWN D. RENNER
CLINE, WILLIAMS, WRIGHT
JOHNSON & OLDFATHER
Attorneys at Law
1900 FirsTier Bank Bldg.
Lincoln, NE 68508
(402) 474-6900
Counsel of Record
for Respondents
Pacific Holding Company and
The Pacific Holding Company
Employee Welfare Benefit Plan